NEW FOUNDATIONS OF THE LAW OF EXPROPRIATION OF ALIEN PROPERTY

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I. Political Arguments and Legal Analysis

The continuous stream of resolutions of the UN General Assembly[1] and much academic writing[2] on the subject notwithstanding, the present state of customary international law regarding expropriation of alien property has remained obscure in its basic aspects;[3] this is true in particular for expropriations in the context of North-South (still better described as "West-South") relations, to which this article is primarily, but not exclusively, addressed. International courts have had no occasion to rule on fundamental issues of expropriation law in the past decades, even though these issues have been relevant to various disputes settled out of court. Eventually, however, the courts will be confronted with cases involving expropriation of alien property: given the continuing and rising importance of foreign investment, the parties involved probably will not invariably prefer negotiated settlements. It must also be recalled here that cus-

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[1]In the United Nations, the issue has been discussed within the broader, opaque concept of "permanent sovereignty over natural resources"; for discussions of the relevant resolutions and their changing substance, see Brownlie, *Legal Status of Natural Resources in International Law (Some Aspects)*, 162 Recueil des Cours 255 (1979 I); Hyde, *Permanent Sovereignty over Natural Wealth and Resources*, 50 AJIL 854 (1956); O'Keefe, *United Nations and Permanent Sovereignty over Natural Resources*, 8 J. World Trade L. 239 (1974); O. Schachter, Sharing the World's Resources 124–33 (1977); Fischer, *La Souveraineté sur les ressources naturelles*, 8 Annuaire Français Droit Int'l 516 (1962).

[2]*See, e.g.*, the bibliographical references in G. Schwarzenberger, Foreign Investments and International Law 203–26 (1969); L. Sohn & T. Buergenthal, International Protection of Human Rights 87–96, 121–24 (1973); references to articles published since 1975 are listed in the respective editions of Public International Law, A Current Bibliography of Articles, No. 16.3 [Investment, Property, Nationalization]. Much of the older literature has lost its direct relevance for contemporary discussion; in the present article, emphasis is therefore placed on comments made after the passing of the Charter of Economic Rights and Duties of States, UNGA Res. 3281 (XXIX) (Dec. 12, 1974); for three monographs of major importance on the development of the law in the period before the advent of Third World activism in this area, see K. Böckstiegel, Die allgemeinen Grundsätze des Völkerrechts über Eigentumsentziehung (1963); A. Fatouros, Government Guarantees to Foreign Investors (1962); G. White, Nationalisation of Foreign Property (1961).

[3]*See, e.g.*, the variety of viewpoints presented in The Valuation of Nationalized Property in International Law, 3 vols. (R. Lillich ed. 1972, 1973, & 1975). Typical of the confusion caused by the neglect of doctrinal elements is, for instance, the article of Francioni, *Compensation for Nationalization of Foreign Property: The Borderland between Law and Equity*, 24 Int'l & Comp. L.Q. 255 (1975); the author establishes an "equitable solution," without comments on the doctrinal foundation of the elements he proposes.

tomary law has occasionally served as a reference standard in treaties and contracts.[4] If an expropriation case were brought before an international tribunal, it could not simply rule that the law governing expropriation of alien property is in dispute and therefore no law at all is applicable. The very notion of international law precludes an argument that acknowledges the existence of "gray areas" in that law: a court could not rule that some law exists, but that it cannot be identified by judicial means.[5]

Despite the amount of writing on the subject, an international court confronted with an expropriation case today would largely have to establish its methodological framework of reasoning independently, without weighty assistance from academicians. In legal writing, as well as in political forums, most proponents of the traditional and the new rules have argued along political lines and neglected traditional legal analysis.[6] Although cer-

[4] *Cf.* P. Kahn, *Les Contrats d'investissement: étude des principales clauses,* INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 54TH CONFERENCE 519 *ff.* (1971). Under Article 42, section 1, of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, an arbitration tribunal shall decide a dispute, unless the parties agree otherwise, on the basis of the law of the contracting state party to the dispute and "such rules of international law as may be applicable."

[5] *See* Mosler, *Völkerrecht als Rechtsordnung,* 36 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZaöRV] 6, 40 (1976):

> The notion has been advanced that the international legal order cannot be interpreted within its own sphere and therefore is not without gaps; this refers to the fact that in various respects the freedom of states is not limited by rules of contractual or customary nature. But against such a notion it must be objected that each norm must be interpreted within the systematic context of the comprehensive legal order and that one cannot therefore speak of international law as an order which limits the actions of states only by explicit rules or contractual commitments; consequently, it is also inappropriate to assume, as a general rule, that international law does not restrict a state's activities as long as no positive rule to the contrary has existed.

(Translation by the author.) *See also* H. Lauterpacht, *Some Observations on the Prohibition of "Non Liquet" and the Completeness of the Law,* in SYMBOLAE VERZIJL 196 (1958); Stone, *Non-Liquet and the Function of Law in the International Community,* 35 BRIT. Y.B. INT'L L. 124 (1959); L. SIORAT, LE PROBLÈME DES LACUNES EN DROIT INTERNATIONAL (1959); Fitzmaurice, *The Problem of Non Liquet,* in MÉLANGES OFFERTS À CHARLES ROUSSEAU: LA COMMUNAUTÉ INTERNATIONALE 89 (1974); Scheuner, *Decisions ex aequo et bono by International Courts and Arbitral Tribunals,* in INTERNATIONAL ARBITRATION, LIBER AMICORUM FOR MARTIN DOMKE 275, 277 (P. Sanders ed. 1967); Bleckmann, *Analogie im Völkerrecht,* 17 ARCHIV DES VÖLKERRECHTS 161, 169 (1977).

[6] Where the state of the law is unclear, lawyers are particularly called upon to probe for an independent analysis; Schachter's general observations are to the point here:

> I believe there is a basis for objective judgments by lawyers of diverse views who are independent in the sense that they are not bound by government instructions and need not be governed by political interests. Such jurists will not be entirely free from their own values or their perception of the values of others. But even though human beings may not entirely escape their bias, it does not follow that the choice to be made is logically a subjective matter, as if it were a question of taste. The point is that a judgment among competing principles by an independent jurist can be made and justified on grounds that are valid for the relevant community of states, rather than on grounds held by the individual alone, or by his government. This, at least, is the position that must be taken by international lawyers who are acting as nonofficial experts and not as advocates of a government or special interest.

Schachter, *The Invisible College of International Lawyers,* 72 Nw. U. L.R. 217, 220, 221 (1977) (footnote omitted).

tain components concerning the substantive law seem to be gaining increasing importance and recognition,[7] much of the literature must be seen as part of the political and economic battle that is taking place.

Politically, expropriation of alien property has emerged since 1973[8] as the issue over which the confrontation between the defenders of traditional concepts of international law and those seeking a change in these concepts has become most acute;[9] developing states have made it clear that on this

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The observations of D. P. O'Connell on the general process by which customary law develops are equally to the point for the subject under discussion:

> There is now so much international law writing in the world—the number of journals and reports in the field is sufficient already to occupy fifty pages of bibliography, leaving aside books and monographs—that no one can digest it. But very little of it rises above the descriptive and the anecdotal; much of it is repetitious, most of it is ephemeral, and in its sum it adds to the systematic exposition of international law in only a fragmentary and disconnected fashion. It prescinds from the hypothesis that international law is the "practice of States", but the practice which is examined is that of one, or at best, a few states, and when aggregated often discloses, not symmetry, but incongruity. By what philosophical trick such an aggregation of what is, after all, mere fact is transformed into a system of "oughtness", is unclear; and the existence of this problem has probably never occurred to the vast majority of writers and researchers in the field of international law. In fact, the content of international law owes much less to a record of how states have acted than to juristic speculation; and despite the emphasis that has, quite rightly, been placed on precedent and empirical techniques, the subject has been systematized by the processes of legal elaboration.

D. P. O'Connell, *The Role of International Law,* in CONDITIONS OF WORLD ORDER 49, 54 (S. Hoffmann ed. 1968).

[7] A comparison of the views of Jiménez de Aréchaga, *State Responsibility for the Nationalization of Foreign Owned Property,* 11 N.Y.U.J. INT'L L. & POL. 179 (1978); García-Amador, *The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation,* 12 LAW. AMERICAS 1, 1 (1980); Meessen, *Völkerrechtliches Enteignungsrecht im Nord-Süd-Konflikt,* in VÖLKERRECHT UND INTERNATIONALE WIRTSCHAFTLICHE ZUSAMMENARBEIT 11 (W. Kewenig ed. 1978); Sornarajah, *Compensation for Expropriation: The Emergence of New Standards,* 13 J. WORLD TRADE L. 108 (1979); and O. SCHACHTER, *supra* note 1, at 124 *ff.*, for instance, indicates that the conclusions reached by these authors in substance coincide to a limited extent, although the doctrinal approaches vary considerably.

[8] The chronological turning point occurred in 1973. The origins of the quest for a new international economic order lie in the middle 1960's (*see* Brownlie, *supra* note 1, at 255); the developing countries did not collectively attempt to pass any resolution embodying the Calvo rule up to 1973. In 1972, the UNCTAD Trade and Development Board still referred to Resolution 1803 (XVII) of Dec. 14, 1962 in its Resolution 88/XII; *see* Note, 7 J. WORLD TRADE L. 376 (1973). In Resolution 3171 (XXVIII), passed in 1973, no international standard was accepted. The amendment proposing the omission of reference to international law was introduced by Algeria, Iraq, and the Syrian Arab Republic; *see* 28 UN GAOR, Annexes (Agenda Item 12) 6 *f.; see also* on this point García-Amador, *supra* note 7, at 30. It is worthwhile remembering here that the change in 1973 coincided with the first demonstration of power by the Organization of Petroleum Exporting Countries.

[9] Virally, *La Charte des droits et devoirs économiques des états, Notes de lecture,* 20 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 57 (1974); Castañeda, *La Charte des droits et devoirs économiques des états, Note sur son processus d'élaboration, id.* at 31 (1974); Virally emphasizes on p. 69: "On se trouve ici au coeur du désaccord le plus fondamental qui a opposé la majorité à la minorité sur le texte de la Charte." Castañeda, the Chairman of the working group charged with drafting the Charter, states: "Depuis le début cela fut un des thèmes les plus délicats et les plus controversés." On p. 46, Castañeda elaborates: "La cause majeure de cet échec (d'aboutir à un accord) fut une question sur laquelle l'opposition des deux groupes de pays était particulièrement vive, celle des accords relatifs aux investissements."

question, possibly more so than on any other, they do not wish to be bound by traditional norms.[10] From an economic viewpoint, expropriation is in many corners considered to be the (symbolic or real) central issue in the struggle for a new international economic order. This combination of political and economic factors[11] appears to have led international organizations and many academic writers to view the issue almost exclusively in terms of interests and power, and to couch their resolutions and articles in extreme legal formulations that directly or indirectly reflect political support of one side or the other.[12]

A tacit premise of most comments on the development of expropriation law appears to be that the present situation is not susceptible to a legal analysis based on the application of the pertinent doctrine of sources. Since, as mentioned above, the order of international law does not permit the assumption of a "gap," a curious situation would result if, in fact, any area of law could not be determined by a court. So far, no adequate response to this discrepancy appears to be in view. The contradiction thus apparent in the mainstream of the general discussion of expropriation can be resolved in two directions. Either it must be admitted that gaps do exist after all in such situations, or a reconsideration of the doctrine of sources must be attempted in a manner that will permit a conclusion to be reached on the substantive law. The first alternative seems neither desirable nor viable within the concept of a legal order. In consequence, the discussion needs to be focused on the doctrine of sources applicable to situations like that now pertaining to expropriation. Thus far, this challenge has on the whole been evaded by most authors.

Statements on the applicable law are rarely accompanied by explanations of the doctrine of sources from which the assumed norms were derived. Such discussion necessarily remains vague and is ultimately unpersuasive. What is called for is a new synthesis of state practice and legal convictions, an elaboration of a new set of rules consistent with doctrines relating to the sources of international law. The complexity of the issues arising in this area becomes apparent when one attempts to apply the traditionally accepted doctrine of sources, as reflected in the Statutes of the Permanent Court of International Justice (Article 38) and the International Court of Justice (Article 38). The traditional terms and notions about the sources of international law have by and large been informed by the tacit assumption of

[10]*See, e.g.*, S. SINHA, NEW NATIONS AND THE LAW OF NATIONS 26 (1967); R. ANAND, NEW STATES AND INTERNATIONAL LAW 57 (1972). Developing countries took this position frequently during the preparation of the Charter of Economic Rights and Duties of States; *see* Rozental, *The Charter of Economic Rights and Duties of States and the New International Economic Order*, 16 VA. J. INT'L L. 309, 315 (1976).

[11]In the view of many developing countries, the political aspect of sovereignty is a necessary precondition to economic development; *see* Virally, *supra* note 9, at 67.

[12]In this perspective it is interesting to note Castañeda's comments upon the way the Charter of Economic Rights and Duties of States was developed: "En bonne partie, la confusion était due à la préparation juridique insuffisante d'un certain nombre de participants, qui par ailleurs tendaient à souligner seulement l'aspect politique du document." Castañeda, *supra* note 9, at 55.

an international community in which fundamental values were shared by all or most states. Obviously, this no longer holds true; the mechanical application of old doctrines of sources may lead today to distorted answers, or to no answer at all, as to which norms govern a given situation. Consequently, at least a partial rethinking of the methodology governing the formation and change of customary law in those areas where only a limited sphere of common values remains is required.[13]

While not claiming that the questions addressed here are (or can be) fully "solved," in the sense that they might be answered beyond any doubt, this article attempts to progress to the point of providing a set of considerations that might be adopted by an international court confronted with an expropriation case. The issue of substantive law will not be addressed at the outset. The article will first draw attention to the paradoxes and anomalies that characterize the present legal and political discussions (section II). Only in the last part will an attempt be made to suggest a framework for determining the present state of the law (section III). It will there become clear that such a framework does require an understanding of the intricacies and entanglements of the political and economic factors reflected in the political discussion. Before reaching these more difficult issues, the discussion will confine itself initially to identifying the issues that need more intensive discussion by describing that part of the law which today may be considered as firmly established (section I). A wider consensus on the status of the traditional law is essential to the clarification of the present law; the continuing insistence upon traditional law by powerful actors in the international community has greatly contributed to the present confusion and obscurity in this important area of international law.[14]

II. The Demise of the Hull Rule and the Failure of the Calvo Doctrine

Contrary to what has often been said,[15] the Hull rule was not developed in order to disfavor developing countries; it was applied in a rational man-

[13] A partial decline of the role of customary international law will necessarily occur in the present situation. However, it is appropriate to ask whether the integrative and ordering function of customary law should not be preserved in all those areas where the doctrine of sources leaves room for preservation of the law.

[14] The position of the United States, which does not differ substantially from that of other Western states, is described in R. Smith, *The United States Government Perspective on Expropriation and Investment in Developing Countries*, 9 Vand. J. Transnat'l L. 517 (1976). *But see also* Gantz, *The Marcona Settlement: New Forms of Negotiation and Compensation for Nationalized Property*, 71 AJIL 474 (1977), for the attitude of the United States in the Marcona negotiations. *See also* W. Rogers, *Of Missionaries, Fanatics and Lawyers: Some Thoughts on Investment Disputes in the Americas*, 72 *id.* at 1 (1978).

[15] *See, e.g.*, Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 AJIL 863 (1961); B. Röling, International Law in an Expanded World 15 (1960). For a recent version of this view, see, *e.g.*, Sornarajah, *supra* note 7, at 109 and 118. H. Mosler, The International Society as a Legal Community 3–6 (1980), points out, in a broader perspective, that international law has historically developed on the basis of a rational concept of relations among equal states.

ner among and against Western countries long before systems with a socialist concept of property were established and before most modern states emerged through the decolonization process.[16]

It is assumed here that United States Secretary of State Hull accurately presented the then current position in international law in 1938 when he wrote his famous letter to the Mexican Government asking Mexico for "prompt, adequate and effective" compensation.[17] Even though the Soviet Union and Latin American countries had challenged the rule before that time, it appears that the overwhelming practice and the prevailing legal opinion supported Hull's position. Judgments such as in the *Norwegian Shipowners* case[18] and the *Spanish-Moroccan Claims* arbitration,[19] and the famous dictum of the Permanent Court of International Justice in the

[16]For a specific case, see, for instance, the positions taken in 1913 by France, Spain, the United Kingdom, and Portugal at the beginning of the *Expropriated Religious Property* arbitration; the award is *reprinted in* 1 R. Int'l Arb. Awards 7. All parties initially agreed that, as a matter of principle, foreigners were owed compensation for expropriation, regardless of the treatment of nationals of the host state; the disagreement related only to the holders of the property in question. In reading the actual award, it must be recalled that in 1920 the parties reached a compromise in which "equity" was accepted as the main basis of the proceedings. *See also* H. VON FRISCH, DAS FREMDENRECHT 225 (1910); Verdross, *Les Règles internationales concernant le traitement des étrangers,* 37 RECUEIL DES COURS 327–36 (1931 III); K. DOEHRING, DIE ALLGEMEINEN REGELN DES VÖLKERRECHTLICHEN FREMDENRECHTS UND DAS DEUTSCHE VERFASSUNGSRECHT 76–80 (1963); Audinet, *Le Monopole des assurances sur la vie en Italie et le droit des étrangers,* 20 REV. GÉNÉRALE DROIT INT'L PUBLIC 4 (1913). *See also* the note written in 1796 by United States Secretary of State Adams:

> There is no principle of the law of nations more firmly established than that which entitles the property of strangers within the jurisdiction of another country in friendship with their own to the protection of its sovereign by all efforts in his power. This common rule of intercourse between all civilized nations has, between the United States and Spain, the further and solemn sanction of an express stipulation by treaty.

Cited in 4 J. B. MOORE, A DIGEST OF INTERNATIONAL LAW 5 (1906). For a general discussion of the historical aspects, see Borchard, *The Minimum Standard of the Treatment of Aliens,* 38 MICH. L. REV. 445 (1940); Mann, *Outlines of a History of Expropriations,* 75 L. Q. 188 (1959); McDougal, Lasswell & Chen, *The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights,* 70 AJIL 431, 440–43 (1976); H. NEUFELD, THE INTERNATIONAL PROTECTION OF PRIVATE CREDITORS FROM THE TREATIES OF WESTPHALIA TO THE CONGRESS OF VIENNA (1648–1815), at 94 *ff.* (1971).

[17]The correspondence is *reprinted in* 3 G. H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 655–65 (1942). Secretary Hull's initial letter of July 21, 1938, states the issue and the positions taken: "During recent years the Government of the United States has upon repeated occasions made representations to the Government of Mexico with regard to the continuing expropriation by Your Excellency's Government of agrarian properties owned by American citizens, without adequate, effective and prompt compensation being made therefor." For an early contrary view of the law, see Fischer Williams, *International Law and the Property of Aliens,* 9 BRIT. Y.B. INT'L L. 1 (1928). The Mexican view is presented in A. GARCÍA-ROBLES, LA QUESTION DU PÉTROLE ET LE DROIT INTERNATIONAL (1939). For a comment on the Hague Conference of 1930 regarding the rules concerning the responsibility of states for injuries to aliens, see Hackworth, *Responsibility of States for Damages Caused in their Territory to the Person or Property of Foreigners,* 24 AJIL 500 (1930).

[18]1 R. Int'l Arb. Awards 332 (1922); for a brief presentation with further references, see Dolzer, *Norwegian Shipowners' Claims Arbitration,* in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, Installment 2 (ed. Bernhardt, forthcoming).

[19]2 R. Int'l Arb. Awards 615 (1925).

Chorzów Factory case support this view.[20] The last time a consensus was reached—at least formally—in the postwar period was in 1963 when UN Resolution 1803 (XVII) called for "appropriate compensation," arguably still within the meaning of the Hull rule; it was then assumed that this resolution reflected existing law.[21] The importance of this point is not confined to that of a historical note. It will be seen below that the historical development of the law has a direct bearing, from an analytical viewpoint, on the judgment concerning the present state of the applicable rules.[22]

State practice immediately following World War II is in many respects inconclusive with regard to the rules on expropriation: laws regarding the protection of alien property in wartime may not be the same as those applicable in peacetime.[23] Moreover, the variety of agreements reached during the postwar period makes it hard to speak of any specific uniform practice. The terms of the treaty between the United States and China entered into in 1979[24] conform to the general postwar practice and indicate that the general thinking on lump sum compensation for wartime damages has not changed considerably over the past three decades. The significance of this sort of lump sum agreement for the development of customary international law is not easy to discern. The International Court of Justice, in a dictum in the *Barcelona Traction* case, flatly asserted that the general circumstances surrounding lump sum agreements do not permit them to be considered as part of the general practice that forms customary law.[25] Others, in particular Lillich and Weston in their important study on lump sum agreements, would not make any distinction between lump sum agreements and other arrangements with regard to expropriated alien property for the purposes of determining customary law.[26] Both views appear to contain correct assumptions, but both also overstate their point. Certainly, lump sum agreements tend to have an "exceptional character" inasmuch as they relate to a variety of damages that occurred during war or warlike situations, and they also reflect the specifically political factors that characterize the necessity of resuming diplomatic and political ties under certain conditions; the precise formula reached in any such agreement thus has no particular value for the determination of customary law. On the other hand, an empirical survey easily demonstrates that a large number of agreements of the lump sum type have been concluded;[27] the Inter-

[20]Case Concerning the Factory at Chorzów (Merits), [1928] PCIJ, ser. A, No. 7, at 32–33.

[21]*See* Schwebel, *The Story of the United Nations' Declaration on Permanent Sovereignty over Natural Resources,* 49 A.B.A.J. 463 (1963); Gess, *Permanent Sovereignty over Natural Resources: An Analytical Review of the United Nations Declaration and its Genesis,* 13 INT'L & COMP. L.Q. 398 (1964).

[22] *See* p. 571 *infra.*

[23] *See* on this point W. BISHOP, INTERNATIONAL LAW 960 (3d ed. 1970), with further references.

[24]TIAS No. 9306, *reprinted in* 18 ILM 551 (1979).

[25][1970] ICJ REP. 3, 40, para. 61.

[26]R. LILLICH & B. WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS 9–43 (1975).

[27]According to Lillich and Weston, *id.* at 43, 95% of claims practice is regulated by lump sum arrangements. Depending upon the definition of lump sum arrangements, this figure might in reality be somewhat lower. Nonetheless, it is incontestable that most claims are channeled through lump sum arrangements.

national Court of Justice has not explained why such a large mass of state practice should not reveal, in a general way, any opinion prevailing in state practice. Much therefore speaks in favor of recognizing, for the purposes of customary law, not specific elements in specific treaties, but the general trend emerging from what seems to be common to such agreements. A survey of lump sum agreements from this perspective yields two basic conclusions: that the Hull rule has not been observed in practice, and that the Calvo Doctrine (as applied to property rights) explains this practice[28] even less than the Hull rule. With reference only to the Hull rule, these conclusions appear to gain additional weight from agreements that are considered more "normal" than lump sum conventions: a significant trend can be discerned in all these arrangements.

By and large, uncompensated expropriations of aliens in nonwar situations have had no place in the postwar period.[29] It requires no gift of prophesy to predict that even Cuba will pay some compensation in a political arrangement with the United States at some date in the future.[30] In most instances of expropriations in the North-South context, some abstract formula (like "book value") was used to justify amounts of compensation that were in fact below those required under the Hull rule and its requirement of adequate compensation in the sense of market value.[31] In an arrangement that has received wide attention, the United States company Marcona, after protracted negotiations pursued formally by the U.S. State Department, had to accept a compensatory arrangement with Peru in which a complex service agreement partly took the place of prompt, adequate, and effective compensation.[32] Libya successfully offered a large amount of oil instead of money as compensation to American oil compa-

[28]The Calvo Doctrine is based on the general notion of an exclusive jurisdiction of any state over its territory and, in principle, on the view that aliens have no more rights than nationals of the state in which they live or enjoy personal rights. Rights and claims of aliens against the host state are therefore to be decided exclusively by the domestic courts of the host country. In the context of expropriation of an alien, the doctrine means that the alien has acquired no right permitting his home state to exercise diplomatic protection. *See* D. SHEA, THE CALVO CLAUSE 16 *ff.* (1955). The Calvo Doctrine was to be applicable to the full range of human rights, including property rights. The position taken by Mexico in 1938 related only to expropriations, and only to general ones as opposed to individual takings.

In the following pages, reference to the Calvo Doctrine is meant only with respect to its operation in the area of the protection of property held by aliens.

[29] For a summary of the practice up to 1959, see [1959] 2 Y.B. INT'L L. COMM'N 1–36.

[30] Cuba has settled claims with other countries affected by the nationalizations; *see* M. Gordon, *The Settlement of Claims of Expropriated Foreign Property between Cuba and Foreign Nations Other than the United States,* 5 LAW. AMERICAS 457 (1973).

[31]With regard to the concept of book value and some of its applications, see Wesley, *A Compensation Framework for Expropriated Property in the Developing Countries,* in 3 THE VALUATION OF NATIONALIZED PROPERTY, *supra* note 3, at 3. *See also* Litvak & Maule, *Forced Divestment in the Caribbean,* 27 INT'L J. 501, 527 (1977). With respect to specific African practice, see Rood, *Compensation for Takeovers in Africa,* 11 J. INT'L L. & ECON. 521 (1977). For the Central and Latin American systems, see R. CASAD & R. MONTAGNÉ, EXPROPRIATION IN CENTRAL AMERICA AND PANAMA: PROCESSES AND PROCEDURES (1975); EXPROPRIATION IN THE AMERICAS (A. Lowenfeld ed. 1971).

[32]*See* Gantz, *supra* note 14.

nies.[33] Other instances of this kind could be added, as well as some cases in which compensation came much closer to the Hull standard.[34]

One may speculate whether all of these cases do indeed support a standard of international law or whether they simply illustrate the thesis that expropriating countries merely choose the timing and the terms of compensation on the basis of political and economic expediency. Iran's decision in favor of compensation of alien shareholders of national banks in August 1980 may well have been guided by reasons of practicality more than by respect for recognized rules of international law; the same may be true of China's willingness to conclude a lump sum agreement to compensate expropriated United States citizens in 1979.

Of course, political elements weigh heavily in the compensation decision-making process. But it must be pointed out that political expediency is the very basis of many norms of customary law;[35] indeed, the important notion of reciprocity in international law is largely explicable in terms of political expediency.[36] Moreover, these considerations are intertwined with the issue of sanctions. Occasionally, it is felt that expropriation in a sense falls outside the sphere of law because of the absence of effective sanctions in this area. Apart from the fundamentally questionable assumptions about the nature of law implicit in such an argument, it is hardly a compelling one on the empirical level: in practice, the very necessity of continuous international economic intercourse in many instances provides a powerful incentive for observation of an international standard regarding expropriation of alien property.[37] This interconnection, incidentally, emphasizes the need to examine and state more clearly the present role of international law in this area.

To summarize the practice of the past decades from the viewpoint of the Hull rule, it is easy to conclude that only one part of Hull's concept is confirmed, *i.e.*, that compensation must be paid for expropriated alien property as a matter of international law; as for the second part, concerning the mode and the amount of compensation, the evidence for the Hull rule's continuing validity falls short of the mark that an international court

[33]Introductory Note, 17 ILM 1, 2 (1978).

[34]Unfortunately, no source exists that comprehensively lists all or most compensation arrangements; for some more recent cases, see Wesley, *supra* note 31.

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> [O]ne has to deduce from the conduct of States their motives for acting in a certain way. In attempting this one often finds that it is largely self-interest which lies behind the conduct of particular States in the course of the development of a customary rule. They try to establish rules of conduct which help to serve their own political ends.

H. MOSLER, *supra* note 15, at 111.

[36]*See* B. SIMMA, DAS RECIPROZITÄTSELEMENT IM ZUSTANDEKOMMEN VÖLKERRECHTLICHER VERTRÄGE (1972).

[37]For a list of sanctions that the United States has construed on the legislative level and that in themselves have a certain preventive effect, see Gantz, *supra* note 14, at 47. More broadly speaking, expropriating developing countries have in general realized that investment will fall off unless they maintain the confidence of foreign investors and trading partners. *See* Schachter, *The Evolving Law of International Development*, 15 COLUM. J. TRANSNAT'L L. 1, 8 *f.* (1976).

would require to be convinced that state practice confirms the existence of the old rule.

Not surprisingly, an analysis of the second traditional element governing the status of all customary law, *i.e.*, the necessary *opinio juris*, does not reveal a very different picture. In the light of the superficial nature of some writing on this point, it needs to be clearly stated that states must be convinced that their conduct is legally required if customary law is to be created and developed.[38] It is also indisputable that there is no canon in international law prescribing the circumstances and the method by which a state must express its legal opinion; its (explicit or implicit) conduct must only permit the inference that a certain state holds a certain view.

That the international climate has changed considerably in the past two decades is clearly reflected in the varying contents of UN resolutions regarding the law applicable to the expropriation of alien property. Resolution 1803 (XVII) still called for "appropriate compensation," which confirmed the relevance of international law, while avoiding precision about the amount of compensation required.[39] It is common knowledge that the

[38]In the opinion of the ICJ in the *North Sea Continental Shelf* case:

> not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio iuris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.

[1969] ICJ REP. 3, 44. The more general question whether the *opinio juris* or the practice of states is the central element of the lawmaking process has only a little bearing on this point. Where the practice itself has not been consistent, the importance of the *opinio juris* necessarily increases. For the various positions on the abstract issue, see Hagemann, *Das Gewohnheitsrecht als Rechtsquelle in der Rechtsprechung des Internationalen Gerichtshofs*, 10 SCHWEIZERISCHES JAHRBUCH FÜR INTERNATIONALES RECHT 79 (1953); Baxter, *Treaties and Custom*, 129 RECUEIL DES COURS 31, 74 (1970 I); J. BARBERIS, FUENTES DEL DERECHO INTERNACIONAL 57–85 (1973); H. THIRLWAY, INTERNATIONAL LAW AND CODIFICATION 53–56 (1972); H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 259–61 (2d ed. 1975). Sohn, *The Shaping of International Law*, 8 GA. J. INT'L & COMP. L. 7 (1978), has pointed out that the traditional doctrine of customary law needs to be adapted to the modern system of rapid communication among states.

[39] *See supra* note 21. The Abs-Shawcross Draft on the Protection of Private Property, presented in 1965 by the OECD, attempted such precision in the sense of the Hull rule, but, not surprisingly, failed; for a history of the draft, see Schwarzenberger, *supra* note 2, at 153–59. In the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, an agreement was reached that reflects the insecurity about the present law; *see* Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States: Applicable Law and Default Procedure*, in INTERNATIONAL ARBITRATION, *supra* note 5, at 12. *See also* Ryan & Baker, *The International Center for the Settlement of Investment Disputes (ICSID)*, 10 J. WORLD TRADE L. 65 (1976); O'Keefe, *The International Centre for Settlement of Investment Disputes*, 34 Y.B. WORLD AFF. 286 (1980).

The Financial Affairs Commission of the Conference on International Economic Cooperation (CIEC), which ended on June 3, 1977, dealt with the topic specifically in the North-South context. No shift in the attitude of states became apparent; *see* the Statement by R. Cooper, *reprinted in* 77 DEP'T STATE BULL. 92, 97 (1977). The text of the Final Communiqué of June 3 is *partially reprinted in* 76 *id.*, at 650–52 (1977). At present, the issue is under

standard employed in Resolution 1803 would not find considerable numerical support in the UN General Assembly today; under the banner of "permanent sovereignty over natural resources," resolutions finding broad numerical support have cast doubt on traditional notions of international law since 1969.[40] Their direct bearing on the process of changing customary law can only be denied if one assumes that the votes cast in favor of these resolutions have no legal character, be it on the basis that they simply stand for political opinions with a clearly nonlegal dimension or that they only relate to a future body of law that does not yet exist.[41] Although such reasoning has been advanced, not much argument is needed to show that it is misguided:[42] the extensive debates in the General Assembly have made clear that legal—and not only political—views were discussed in this context; this is confirmed rather than contradicted by the wording proposed and adopted in the Charter.[43] Even if one were inclined to characterize these views as future-oriented, the number of states subscribing to them would in fact draw this "future" immediately into the present.[44] Parenthetically, it must be added here that Western governments invoked resolutions of the United Nations on expropriation as evidence of the state of the law as long as the standard of "appropriate compensation" was supported there;[45] the relevance of this fact is not diminished by the observation that the Charter also contains, in other parts, programmatic phrases that have no relationship to the present state of international law.

The fact that the impact of the views held by a majority of states has been declared irrelevant by several writers probably stems from a dogmatic distortion. These writers may assume that admission of the impact of these views upon customary law would necessarily entail acceptance of the Calvo Doctrine as representing international law today: the alternative is simply

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discussion in the preparations for a code of conduct for transnational corporations; the outcome remains to be seen.

[40]*See supra* note 1.

[41]*See, e.g.*, the award in the Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. The Government of the Libyan Arab Republic arbitration, 17 ILM 3, 30 n.87 (1978).

[42]*See, e.g.*, the general remarks of Brownlie, *supra* note 1, at 260.

[43]Jiménez de Aréchaga, *supra* note 7, at 184; Brownlie, *supra* note 1, at 268.

[44]Given this strong majority of votes in favor of the Charter and the intense discussions preceding this vote, the more general objections to the legal relevance of UN resolutions have no decisive weight in this particular context. The fact that the representatives of states do not necessarily derive their authority from their domestic lawmaking body but "only" from the executive branch, for instance, could hardly be a convincing argument against the assertion that the majority of the member states has expressed its position on the present and future status of international law on this point.

Recognition of the legal relevance of UN resolutions in this specific context does not imply that these resolutions create "instant customary international law." As to the shortcomings of the present voting system in the United Nations and their implications for the legal status of resolutions, see Mosler, *supra* note 5, at 36; Geck, *Völkerrechtliche Verträge und Kodifikation*, 36 ZAöRV 96, 124 (1976); Tomuschat, *Die Charta der wirtschaftlichen Rechte und Pflichten der Staaten, id.* at 444, 489. *See also* Weintraub, *How the UN Votes on Economic Issues*, 53 INT'L AFF. 188 (1977).

[45]Brownlie, *supra* note 1, at 262, 264.

seen as being between Hull and Calvo. The background to such reasoning is the traditional doctrine of sources under which the freedom of states was presumed to be limited only in those areas where practice and legal conviction uniformly favored a certain view.[46]

Precisely at this point, however, the traditional doctrine of sources does not apply under present circumstances: this doctrine was not shaped to situations in which a traditional rule was opposed by one group of states and upheld by another one immediately affected by the rule in question.

These remarks necessarily lead to the essential question: what is the significance of the almost 100 votes that were cast—after unsuccessful negotiations between essentially two groups of states—in 1974 in favor of Article 2(2)(c) of the Charter of Economic Rights and Duties of States?[47] To view the issue in terms of a law-creating process and consequently to determine that the opposing votes of Western industrial states obstruct the law-creating power of the resolution goes one step too far. The prior question that must be considered relates to the derogatory impact upon existing rules of a customary nature. Both these levels can and must be separated with regard to the doctrine of sources. Much of the writing on the legal effect of General Assembly resolutions misses this important point by failing to distinguish between the derogatory effect on existing rules on the one hand, and the establishment of new rules on the other.[47a]

The preliminary doctrinal result of these considerations is as simple as

[46] It is not of central importance here whether the widespread description of the *Lotus* judgment ([1927] PCIJ, ser. A, No. 10) as extremely positivistic is entirely correct. It is noteworthy, however, as pointed out by H. Steiner and D. Vagts (*supra* note 38, at 278), that the majority opinion included these remarks:

> The Court . . . has not confined itself to a consideration of the arguments put forward, but has included in its researches all precedents, teachings and facts to which it had access and which might possibly have revealed the existence of one of the principles of international law contemplated in the special agreement.

Quoted in id. at 257. In a decision that is less well known than the *Lotus* case, the same Court again had to deal with the presumption-of-freedom rule 2 years later (Oder-Kommissions Case, [1929] PCIJ, ser. A, No. 23). In its interpretation of a clause of the Versailles Treaty, Poland relied on the *Lotus* case and argued that, in ambiguous cases, treaties must be read in a way that least impairs the parties concerned. The Court rejected this approach. It ruled that general considerations related to the subject matter itself took priority over the presumption-of-freedom rule.

Bernhardt, *Ungeschriebenes Völkerrecht,* 36 ZaöRV 50, 58 (1976), has rightly pointed out that the reality of the interdependence of states today must find its counterpart in the modern doctrine of international law.

[47] Subparagraph 2(c) of Article 2 of the Charter is quoted on p. 438 *supra.*

[47a] This article does not examine all facets of the general problem of change in customary international law. It is assumed here that, contrary to a strictly positivist view, a new state is bound to those rules of international law which exist when it is established. It is also assumed that customary law is subject to a condition of "changed circumstances" analogous to the *clausula rebus sic stantibus* applicable to treaties (Art. 62 of the Vienna Convention on the Law of Treaties). It is not necessary to consider here whether, when a rule of customary law was generally accepted and firmly established, a state that consistently upheld that rule in practice and *opinio juris* can continue to invoke it if, as a result of an influx of states that did not exist when the rule was established, a large majority of the international community now challenges the rule. In the present case, this problem does not arise because the rule in question was not firmly established.

it is convincing: the continued validity of a rule of customary law requires that a clear majority of states view this rule as legally binding. Since there is cogent support for the view that the votes cast for Article 2(2)(c) of the Charter reflect opinions about the present state of law, the conclusion is inescapable that the existence of the Hull rule as a rule of present law is not sustained by the prevailing doctrinal opinion within the international community.

At this point, one may well ask what bearing present investment treaty practice has upon this result.[48] It is generally accepted that under certain circumstances, the existence of identical regulations in a large number of international treaties can lead to the formation of customary law.[49] Thus, it becomes necessary to take into account the considerable number of investment treaties with clauses similar to the Hull rule that have been concluded in recent years. It cannot be overlooked in this context that the Lomé II agreement concluded in 1980 between the nine member states of the European Community and 58 African, Caribbean, and Pacific states contains a most-favored-nation clause (Article 64), which in effect means that the protection of large portions of foreign investment in these areas comes fairly close to the Hull standard.[50] A similar arrangement of the European Community with the ASEAN states may well be concluded in the coming years. Moreover, it is quite possible that bilateral treaties on investment protection will in the future also be desirable from the viewpoint of semi-industrialized states (such as Brazil or Nigeria), which may then be concerned with the treatment of the foreign investments of their own citizens as well.[51] Overall, a network of treaties exists, and this pattern may well become even more extensive in the future. This perspective supports a widely held view that the full protection of foreign investment as guaranteed under the old Hull rule is also desirable under present circumstances.

In evaluating the impact of bilateral and multilateral treaties, however, it should be firmly kept in mind that the property protection clauses by no

[48]Up to December 1976, 143 bilateral agreements for the protection of foreign investment were concluded; *see* INTERNATIONAL CHAMBER OF COMMERCE, BILATERAL TREATIES FOR INTERNATIONAL PRIVATE INVESTMENT (1977). It is remarkable that in 1980, the United Kingdom alone concluded four such agreements: with Sri Lanka (Cmnd. 7984, No. 1, 1980), *reprinted in* 19 ILM 886 (1980); Senegal (Cmnd. 8079, No. 1, 1980); Bangladesh, [1980] GR. BRIT. TS No. 73 (Cmnd. 8013), and the Philippines, [1981] *id.* No. 7 (Cmnd. 8148). The highest total number of investment treaties so far has been concluded by the Federal Republic of Germany.

[49]Doehring, *Gewohnheitsrecht aus Verträgen,* 36 ZAÖRV 77, 92 (1976). *See also* Baxter, *supra* note 38, at 31.

[50]*See* Joint Declaration on Investments Relating to Article 64 of the Convention, *reprinted in* 19 ILM 333 (1980). Up to 1980, the Federal Republic of Germany alone had concluded investment treaties with 22 states signatory to the Convention which incorporate the standard of the Hull rule or similar clauses.

[51]As early as 1976, oil-producing countries sought guarantees from Western countries concerning appropriate compensation in case of nationalization; *see* Economic Times, Jan. 29, 1976 (cited in Jain, *Permanent Sovereignty over Natural Resources and Nationalization in International Law,* 19 J. INDIAN L. INST. 241, 250 (1977)). Most of these states had strongly supported the statements made in the Charter of Economic Rights and Duties of States concerning expropriation.

means constitute the only object of these treaties. They usually provide for a closer general form of cooperation and, more importantly in this context, for the industrial state involved to promote the interests of the developing state in a manner that definitely goes beyond a noncontractual type of cooperation; the terms of the Lomé II agreement, for instance, illustrate this point well. Thus, a close examination of such treaties indicates that the countries involved have established special regimes that would not have come into existence in the absence of the treaties.[52] One aspect of these regimes is the property protection clause. In other words, the existence of these treaties in itself does not support an argument that the relevant clauses are declaratory of the present state of customary law. A different view might be appropriate in the future if a general scheme of global cooperation should emerge; the present situation is obviously far from such a scheme.

Even though it therefore appears inadequate to argue that the bilateral treaties in question have created customary law, it would not necessarily follow that they could not be viewed as evidence of a widespread conviction that a corresponding rule of customary law exists. Treaty practice either may be seen as a restatement of accepted customary law or as the establishment of a legal relationship that the parties believe must be specially agreed upon owing to the very absence of a corresponding rule. Because it is not unusual for preexisting obligations to be repeated in clear, technical language in a treaty, it is necessary to judge the significance of certain treaty practice in the development and identification of customary law by reference to factors beyond the treaties in question. It must be shown whether or not further evidence exists that supports a corresponding rule of customary law. Necessarily, it must again be asked whether the rules set forth in the treaties were also followed consistently when the states involved were not bound by treaties. The same question is raised from a different perspective when it is asked whether the states concluding the treaties felt themselves legally obligated to regulate their relationship in the way they phrased the treaty. Thus, although analytically the relevance of treaty practice as evidence of preexisting customary law may be distinguished from the significance of treaty practice as an element in the formation of customary law, the outcome of the two paths of inquiry on the state of customary law is the same if it is established that no corresponding consistent practice of parties not obligated by treaties exists and that the parties to the treaties in question did not intend to respond to a legal obligation when they concluded the treaties. Since the foregoing remarks have indeed shown such results, it may not be assumed that the property protection

[52]In some instances, however, investment treaties have in substance not gone considerably beyond an agreement for the protection of property. For two recent examples, see the Agreement for the Promotion and Protection of Foreign Investments, between Sri Lanka and the United Kingdom, concluded on Feb. 13, 1980, *supra* note 48; and the Agreement between the Federal Republic of Germany and the Syrian Arab Republic, concluded on Aug. 2, 1977, *reprinted in* [1979] BGB1.II 423. Nevertheless, these treaties should also be seen in their legal and political context; they sometimes follow capital aid programs or are prompted by special political considerations.

clauses in existing bilateral treaties may be seen as evidence of a corresponding rule of customary law.

Thus, a contradiction cannot be observed today between the conduct and the attitudes of countries that voted for Article 2(2)(c) of the Charter and that previously or subsequently concluded investment treaties with property protection clauses.[53] The apparent contradiction can be easily explained in the light of the special benefits that developing countries enjoy under such treaties. From a policy viewpoint, such treaties signify that the countries concerned do not view the Hull rule as undesirable per se; the inference is warranted that these countries assume that the Hull rule should apply only under conditions of mutually intensified cooperation and that these conditions are not secured by the general norms of present customary international law. Two consequences may be drawn from this. First, the relevance of the votes cast in the United Nations cannot now be questioned on the grounds of given treaty practice. Second, the protection of alien property by international law would probably receive much less opposition from developing countries if the substance of the rule tangibly contributed to more beneficial forms of international cooperation.[54]

Some considerations on the circumstances that in law justify equating treaty practice with customary law must be added. Although the requisite extent of objective practice remains somewhat unclear, modern writers consider it beyond doubt that the parties to the treaty must subjectively view their conduct as legally required if customary law is to be defined through treaties. In a recent analysis of the issue, Doehring therefore

[53]The same is true with respect to enactments of foreign investment laws on the domestic level. Pakistan, for instance, voted in favor of Article 2(2)(c) of the Charter, but in 1976 introduced a law providing far-reaching guarantees for alien investors. Pakistan had concluded investment guarantee treaties with the United States in 1954 and with the Federal Republic of Germany in 1959. The relevance of international law and domestic law is different in this respect: domestic law can be freely enacted, and, in particular, can be unilaterally repealed at any time.

[54]It is interesting to note here that for more homogeneous international orders, existing or projected, the requirement of obligatory compensation seems to be beyond doubt. The Communist countries have among themselves obviously agreed on this point; *see* Drucker, *Compensation Treaties between Communist States,* 10 INT'L & COMP. L.Q. 250 (1960). Similarly, the Group of 77 seems to emphasize the necessity for investment protection as long as the home state belongs to the group: "Les pays en développement bénéficiaires sont instamment priés de prendre, dans le cadre de leurs politiques et de leurs législations nationales, des mesures visant à garantir la sécurité des investissements d'autres pays en développement et de faire bénéficier ces investissements d'un régime privilégié." Statement by the Foreign Ministers of the Group of 77, Sept. 29, 1979, UN Doc. A/34/553, para. 17. Such an approach was suggested earlier by Jain, *supra* note 51, at 256.

In his bold dissenting opinion in the *Anglo-Iranian Oil* case ([1952] ICJ REP. 92, 124), Judge Alvarez developed the contours of a modern, dynamic international order; with respect to expropriation issues, he stated that recourse to an international court should always be given. In the same case, Judge Levi Carneiro wrote (p. 151) that rules on state responsibility are "a prerequisite of international cooperation in the economic and financial fields." *See also* the ideal order envisaged by McDougal, *et al., supra* note 16, and the rules there suggested with regard to expropriation issues. Moreover, the position of the Arab states is remarkable; *see supra* note 51.

rightly suggested that international treaties create customary law only if the interests expressed in these treaties carry such weight in the view of the states concerned that any act violating these interests must be judged as delictual.[55] If the law on expropriation of alien property is seen in this context, it will be noted that in the past, investment contracts have been concluded in which developing countries have agreed to pay "just and equitable compensation in accordance with international law."[56] Consequently, one might be led to believe that treaty practice indeed indicates the conviction of states that the Hull rule is part of customary international law. However, "just and equitable compensation" is not necessarily identical with "full, prompt and effective compensation." More important, the number of such agreements has remained limited, and in a general survey of state practice they emerge more as exceptions than as the rule. Given the strong evidence of the voting on Article 2(2)(c) of the Charter of Economic Rights and Duties of States, the weight carried by a smaller number of agreements explicitly linking "full" (or similar) compensation and a reference to a corresponding requirement under international law is too light to support the argument that treaty practice is clear enough to show that the Hull rule is still part of customary law. To return to Doehring's formula, there is therefore not sufficient evidence at this point for the proposition that developing states will assume that delictual conduct has occurred when the treatment of alien property differs from that typically guaranteed by investment treaties.

A final, much neglected aspect of the present state of the Hull rule must be mentioned from the perspective of sources of international law. Traditionally, the norms contained in municipal legal orders have had a strong influence on the international law of expropriation.[57] The concept of the minimum standard historically emerged as a result of the strong influence of these internal legal notions. It is not necessary to examine here whether the notion of the minimum standard actually developed outside the scope of and alien to the generally accepted doctrine of sources of international law and, if so, to what extent the rationale of this standard could be upheld today. The point here is rather that a survey of present domestic property legal systems has an immediate bearing upon the substance of the modern notion of a "minimum standard." The legal requirement of "prompt, adequate and effective compensation" for expropriated property is clearly an exceptional requirement today from a comparative viewpoint. As has been shown elsewhere, this is even true for the Western industrial states.[58]

[55]Doehring, *supra* note 49, at 92.

[56]*See* the examples noted in P. Kahn, *supra* note 4, at 519 and 525.

[57]A. ROTH, THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS 86 (1949).

[58]*See* R. Dolzer, Nationalization and Compensation in a Code of Conduct for Transnational Corporations (1980, on file with the United Nations Centre on Transnational Corporations).

In a major group of liberal states, the constitutions indicate a broad principle that the legislatures must observe when exercising their discretion in the determination of compensation. In Belgium (Art. 11 of the Constitution), France (Preamble of the Constitution, referring to Art. 17 of the Declaration of Human Rights of 1789), and the United States (Fifth Amendment), the Constitutions call for "just compensation." In the Federal Republic of

Jurisprudentially, the liberal concepts of the 19th century with their strong emphasis upon individual rights have not lost their dominance, but have been modified by a utilitarian trend reflecting a strong consciousness of the relevance of societal relations to property law.[59] The labeling of the Hull rule as a minimum standard may well have been correct in the past, but it would be a misnomer under present circumstances; at the domestic level, the Hull rule is today a "maximum standard" which is not fully observed in the major capital-exporting countries. The developments in liberal states and the fading away of a common perspective on the role of private property in the international community do not in themselves signify the end of the maximum protection of private property on the level of international law; but the coexistence of liberal economic orders,[60] mixed economies, and Communist states requires a much more searching and detached analysis to define the present rules than was necessary in the days of homogeneous domestic systems.

A few remarks will be added here about the relevance of such principles as "vested rights"[61] or "unjust enrichment"[62] in this context. One might consider transferring these concepts to the level of international law in view of their widespread acceptance in domestic orders. However, it should be recalled that there are "general principles of law" that do not simultaneously constitute a part of international law.[63] Before the binding international effect of certain general principles can be established, it has to be seen whether there are congruent conditions for their operation in both

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Germany, the Parliament must find a "just balance of interests" of the owners and the public (Art. 14 of the Constitution). Within the liberal countries, a mandatory standard corresponding to the Hull rule was included in Art. 17 of the Greek Constitution.

In a considerable number of liberal countries, the legislature is not specifically bound by any constitutional or other document in the method and principles by which it determines the amount of compensation (*cf.* Art. 42 of the Italian Constitution; Art. 33 of the Spanish Constitution; ch. 2, §18 of the Swedish Constitution; the law applicable in the United Kingdom; and Art. 17 of the Swiss Draft Constitution presented in 1977 by the Commission of Experts).

[59]For a thoughtful modern philosophical discussion of the relationship between utilitarian thought and concepts of individual rights, see Hart, *Between Utility and Rights,* 79 COLUM. L. REV. 828 (1979).

[60]Broadly speaking, property rules in the Western countries have not been entirely inflexible; *see, e.g.,* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860, at 31–34 (1977); W. NELSON, AMERICANIZATION OF THE COMMON LAW 123 (1975); Philbrick, *Changing Conceptions of Property in Law,* 86 U. PA. L. REV. 691 (1937). For the recent transformation of German property law in response to environmental issues, see R. DOLZER, PROPERTY AND THE ENVIRONMENT (1976).

[61]Generally on the notion of vested rights in international law, see Kaeckenbeeck, *La Protection internationale des droits acquis,* 59 RECUEIL DES COURS 317 (1937 I); Lalive, *The Doctrine of Acquired Rights,* in PRIVATE INVESTORS ABROAD: RIGHTS AND DUTIES 145 (Southwestern Legal Foundation, 1965); I. FOIGHEL, NATIONALIZATION AND COMPENSATION 124–28 (1964). For a recent critical evaluation of the notion of "acquired rights" in international law, see K. Sik, *The Concept of Acquired Rights in International Law,* 24 NETH. INT'L L. REV. 120 (1977).

[62] *See* the discussion at p. 580 *ff. infra.*

[63] *See* on this point Bothe, *Die Bedeutung der Rechtsvergleichung in der Praxis der internationalen Gerichte,* 36 ZAÖRV 280 (1976); Hailbronner, *Ziele und Methoden völkerrechtlich relevanter Rechtsvergleichung, id.* at 190.

the domestic orders and the international legal order. With respect to the concepts of vested rights and unjust enrichment, a transfer from domestic to international law is highly problematic indeed. Considerations regarding the sovereignty of the host state and problems of property valuation and procedural aspects, for instance, may call for different interpretations under a specific domestic order than under international law. Moreover, it is rather questionable in theory to draw inferences from a state's domestic order about an aspect of law on which that state has directly pronounced another legal view for the purposes of international law. For these reasons, recourse to general principles offers no special insight today into the standing of the Hull rule.

In summary, it is plain that defending the Hull rule under present circumstances must be seen as an element of the political struggle for and against the protection of alien property on the level of international law. As far as currently applicable law is concerned, close examination lends little support to the Hull rule: recent practice, prevailing legal opinion, and the development of national property orders all speak against it.[64]

The negative implications for the validity of the Hull rule might be taken as simultaneously indicating acceptance of the Calvo Doctrine;[65] from a political viewpoint, such reasoning is suggested by the circumstance that the Hull rule and the Calvo Doctrine represent the major positions in the present political struggle.[66] Legally, however, determination of the current status of the Calvo Doctrine requires the same doctrinal examination as any other rule. Practice, *opinio juris,* and domestic legal orders are again the relevant areas of inquiry. The Calvo Doctrine's standing in current international law may be seen by referring to the same considerations of

[64]*See also* Jiménez de Aréchaga, *supra* note 7, at 184.

[65]*See, e.g.,* Akinsanya, *Permanent Sovereignty over Natural Resources and the Future of Private Investment in the Third World,* 18 INDIAN J. INT'L L. 175, 184 (1978). The most comprehensive analysis of the clause, its background, and its legal implications is still to be found in D. SHEA, THE CALVO CLAUSE (1955); *see also* Freeman, *Recent Aspects of the Calvo Doctrine in International Law,* 40 AJIL 121 (1946); Lipstein, *The Place of the Calvo Clause in International Law,* 22 BRIT. Y.B. INT'L L. 130 (1945). The historical background prompting the appearance of the doctrine is described in Scott, *Hague Convention Restricting the Use of Force to Recover on Contract Claims,* 2 AJIL 78 (1908); *see also* the factual background of the Cerruti arbitrations, 6 AJIL 965 (1912).

[66]Whereas the original intent of the Calvo Doctrine was to prevent the misuse of diplomatic protection, the modern attack upon the Hull rule receives its main impetus from economic and political considerations. It is of interest here, too, that the Group of 77 agreed in September 1979 that developing countries should take measures ensuring the security of investments coming from other developing countries; *supra* note 54. Considering the Calvo Doctrine in the context of the alien's general status in the host country, it is odd that the alien should have the same obligations as nationals of the host state without acquiring the same rights (such as electoral or social benefit rights). The notion of "comunidad de fortunas" therefore has no proper place in this context; *see* on this point the award in the George W. Hopkins Claim (1926), 4 R. Int'l Arb. Awards 41, 47. In explaining the attempts of Latin American countries to promote the Calvo Doctrine, it must be remembered that it dates from an era in which European states claimed—and sometimes exercised—the right to secure the payment of compensation by means of force; today such a form of self-help would not conform to international law.

practice and *opinio juris* that were applied above to the Hull rule,[67] but one important facet must be added. It concerns the process by which an existing rule of customary law is altered. The consent of the major states affected is indispensable for such a change;[68] the principle of the "persistent objector" prevents a rule of customary law from being applied against an individual state if it has continuously opposed that rule.[69] This reveals no special conservative trait in international law; it is simply an illustration of the requirement that the process of change in customary international law is necessarily built upon the consensus of the major sectors of the international community, and that international law has the dual function of preserving order and of facilitating changes in the interest of the world community.[70]

If the Calvo Doctrine is considered against this background, it is hard to find any convincing argument that it exists on the level of universal customary law.[71] International practice confirming the Calvo Doctrine is nowhere visible, and the legal opinions of the Western capital-exporting nations definitely refute the argument that all major groups affected have consented to a change in customary law over to the Calvo Doctrine. In addition, a comparative survey of domestic property laws provides a powerful argument against the binding nature of the Calvo Doctrine; it rather tends to indicate the presence of a general principle of law protecting alien property on the level of international law. The development of the recognition in most national orders that human rights reflect fundamental rights of their citizens may also be seen as a clear rejection of the Calvo Doctrine.[72] These brief remarks may suffice here to refute the claim that the Calvo Doctrine has legally replaced the Hull rule.

[67] *See* p. 559 *ff. supra.*

[68] *See also* on this point H. MOSLER, *supra* note 15, at 28:

> Furthermore a majority vote is not convincing if the *major pars* is not at the same time the *sanior pars,* that is, if the vote is the result of the common political interest of the concurring States without regard to an adequate solution of the problem in the general interest.

The ICJ clearly pointed this out in the North Sea Continental Shelf case, [1969] ICJ REP. at 42 and 43.

[69] *See* Norwegian Fisheries case, [1951] ICJ REP. 115, 131.

[70] *See* on this point B. RÖLING, *supra* note 15.

[71] Jiménez de Aréchaga, *supra* note 7, at 181.

[72] Art. 17 of the Declaration reads: "1. Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property." For the development of the discussions within the United Nations on this point from 1948 to 1955, see in particular the original proposal of Australia (UN Doc. E/CN.4/AC.1/21, at 1 (1948)), the initiative of the Philippines (UN Doc. E/CN.4/353/Add.3, at 10 (1950)), and the Belgian initiative (UN Doc. E/AC.7/SR.148, at 9 (1950)); the discussion in the 7th session of the Commission on Human Rights, May 7–8, 1951 (UN Docs. E/CN.4/SR.230–31), in its 8th session, May 20–21, 1952 (UN Docs. E/CN.4/SR.302–03), and in its 10th session, Feb. 25–March 2, 1954 (UN Docs. E/CN.4/SR.413–18); and the discussion in the Third Committee of the General Assembly at its 9th session, 1954 (9 GAOR, C.3 (557–76th mtgs.), UN Docs. A/C.3/SR.557–76, at 74–170); as well as the summarizing Memorandum of the Secretary-General of July 1, 1955 (10 GAOR, Annexes (Agenda Item 28, pt. II), UN Doc. A/2907 and

It is not necessary in this article to enter into a detailed discussion of the substantive meaning of Article 2(2)(c) of the Charter of Economic Rights and Duties of States.[73] Whereas the Calvo Doctrine may leave it entirely to the host state to decide the amount of compensation, a competent observer has commented that the Charter—as an international document expressing principles of international law—requires compensation on the level of international law, but leaves it to the expropriating state to determine the amount.[74] Differing views on this point may entail a significant difference in practice when it comes to the exercise of diplomatic protection.[75] In other respects, however, the difference appears to be negligible. If no specific obligation exists on the international law level, the legal significance of a more abstract "obligation" is close to being negligible. One may well put such a view of the compensation issue in the same category as the Connally Reservation to a declaration under Article 36 of the ICJ Statute: both such obligations are illusory and have a political, but no specifically legal, character.[76]

III. Doctrinal and Substantive Elements of the Present Law

Neither the Calvo Doctrine nor the Hull rule represents existing customary law. Neither is tenable in principle, nor do they help to explain

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Adds.1 & 2, at 65–67). It may be argued that the judgment of the ICJ in the *Barcelona Traction* case ([1970] ICJ Rep. 3, 32, para. 34), confirms that the right to hold property does not in every respect enjoy the status of a human right; *see also* the dissent of Judge Gros, at 274, para. 12. *See also* on this point C. Amerasinghe, State Responsibility for Injuries to Aliens 278–81 (1967); McDougal *et al.*, *supra* note 16; *but see* Sornarajah, *supra* note 7, at 112.

[73] Generally on the Charter and Article 2(2)(c), see Brower & Tepe, *The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?*, 9 Int'l Law. 295 (1975); Castañeda, *supra* note 9; Feuer, *Réflexions sur la Charte des Droits et Devoirs économiques des Etats*, 79 Rev. Générale Droit Int'l Public 273 (1975); García-Amador, *supra* note 8; Haight, *The New International Economic Order and the Charter of Economic Rights and Duties of States*, 9 Int'l Law. 591 (1975); Kiser & Aldridge, *The Charter of Economic Rights and Duties of States: A Solution to the Development Aid Problem?*, 6 Ga. J. Int'l & Comp. L. 441 (1975); R. Meagher, An International Redistribution of Wealth and Power (1979); Rozental, *supra* note 10; Seidl-Hohenveldern, *Die "Charta" der wirtschaftlichen Rechte und Pflichten der Staaten*, 21 Recht der internationalen Wirtschaft 236 (1975); Schachter, *supra* note 37; Tomuschat, *supra* note 44; Virally, *supra* note 9; R. White, *A New International Economic Order*, 24 Int'l & Comp. L.Q. 542 (1975). A thorough, if in part questionable, analysis is found in Centro de Estudios Económicos y Sociales del Tercer Mundo, Exégesis de la carta de derechos y deberes económicos de los Estados (Mexico, 1976).

[74] *See* Castañeda, *supra* note 9, at 54.

[75] *See* on this point Lillich, *The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law Under Attack*, 69 AJIL 359 (1975); García-Amador, *supra* note 8, at 50.

[76] This view of the Connally Reservation has been most clearly stated by Judge Lauterpacht in his dissenting opinion in the *Interhandel* case ([1959] ICJ Rep. 6, 95).

It is an ironic comment upon the present situation that some learned writers of the Third World have been at pains to construe Article 2(2)(c) as admitting the relevance of international law (*see, e.g.*, Castañeda, *supra* note 9, Jiménez de Aréchaga, *supra* note 7), whereas some Western commentators have tended to view the Charter on this point as a blatant rejection of international law (*see, e.g.*, Brower & Tepe, *supra* note 73; Haight, *supra* note 73). The latter interpretation would not seem to serve the apparent interest of the writers in the protection of foreign investment, though it probably meets a desire to discredit UN majority voting.

prevailing practice. The practice lies somewhere between these rules. The rigid insistence upon either of the two concepts at the cost of an alternative perspective has tended to frustrate legal analysis. What is urgently needed from a conceptual viewpoint is the "missing link": a set of standards derived from the criteria that directly or indirectly guide present practice and legal opinions, and that therefore simultaneously help to indicate the present status of the law.

The Political Framework in Perspective

Before an attempt is made to grapple with this subject, certain observations on the complexities, anomalies, and contradictions of the present lines of political debate need to be made. One must appreciate the nature of the verbal conflict to penetrate to the core of the differences and common ground, which tend to be overshadowed by rhetoric. Moreover, since international law necessarily develops within the larger framework of international political alliances and factions, when political situations involve various conflicting interests, legal solutions tend to consist of compromises that harmonize these interests to the best extent possible in the given set of political circumstances.

The modern postwar challenge to traditional rules of property protection is clearly rooted in the economic aspirations of developing states, which are expressed in political terms such as "self-determination."[77] The conceptual framework of the resolutions on permanent sovereignty over natural resources demonstrates this relationship. The major thrust of the modern attack on the Hull rule stems from the fear that this rule might actually prevent independent national regulation of the domestic economy; this fear has been well-founded in particular situations, such as in monocultural economies largely dominated by foreign owners. More extreme objections against the Hull rule, *e.g.*, that compensation for colonial economic injustice is owed under the rules of state responsibility, have been made and are indeed often cited in the literature, but have carried little weight in serious discussions and arguments about present and future practice.[78]

In economic terms, the real concern engendered in developing states by the Hull rule is its effect on the balance of payments. Whereas this concern was (and is) real in the short term, its overall economic value under modern circumstances is best described as negligible. The lack of capital in developing states is notorious and needs no further description here. It is also clear that monetary assistance from international or national public institutions is not (and will not be on a midterm basis) strong enough to obviate

[77]Brownlie, *supra* note 1, at 255.

[78]*See, e.g.*, Girvan, *Expropriating the Expropriators: Compensation Criteria from a Third World Viewpoint*, in 3 THE VALUATION OF NATIONALIZED PROPERTY, *supra* note 3, at 149 (1975). Of course, some argue that present international economic relations are nothing but a contemporary reflection of the former political colonization; *see, e.g.*, G. FRANK, LATIN AMERICA: UNDERDEVELOPMENT OR REVOLUTION (1969); KARL MARX ON COLONIALISM AND MODERNIZATION (S. Avineri ed. 1969). A survey of the older wide literature on this point is found in A. HIRSCHMAN, A BIAS FOR HOPE (1971); D. APTER, THE POLITICS OF MODERNIZATION (1965).

the necessity for increased private foreign capital.[79] The real question today concerns the appropriate channeling of this private capital to developing countries, not its general necessity. Of course, theories of economic "dissociation" and other similar extravagant concepts have been developed, but the actual continuous demand for foreign capital, as expressed in numerous resolutions, clearly speaks against such views.

The practical relationship between the need for more private capital and the international regulation of expropriation is obvious. Private capital is attracted only where profits can be expected. Evidence exists for the thesis that, in practice, the foreign businessman's concern about rules relating to alien property is not outweighed by tax incentives, subvention schemes, or political risk insurance schemes of his home state.[80] Thus, whereas the objections to the Hull rule were intended to serve the economic aims of host states, the Calvo Doctrine would in fact operate, to a large extent, as an economic obstacle to supplying the needs of developing states. One might speculate whether this is the real reason for some painful attempts by writers from the Third World to construe Article 2(2)(c) of the Charter of Economic Rights and Duties of States as admitting the relevance of international law.[81]

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> Transnational corporations, with their capacity to mobilize financial resources and deploy specialized technological and managerial know-how, occupy an important place in the economic interactions between developed and developing countries, especially in the industrialization process of the latter. Their activities have a significant influence on the pace and pattern of the changes that are being sought. Part of the challenge of advancing the establishment of the new international economic order consists of devising ways and means through which the resources of transnational corporations can be harnessed to contribute to the development goals of the developing countries, consistent with the strengthening of their self-reliant capabilities. The over-all analysis of the progress, problems and prospects in this respect constitutes the subject matter of this document.

UN Doc. E/C.10/74, at 4 (May 16, 1980) (footnote omitted). *See also* sections 2 and 3 of the Programme of Action adopted by the General Assembly at its 6th Special Session (UNGA Res. 3202 (S-VI)(1974)) and the Annual Reports of the International Finance Corporation of recent years.

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> It appears that changes in the pattern of ownership and the reactions of transnational corporations to their perception of unstable investment conditions (particularly in the mineral sector), as well as cyclical factors, have led to a considerable decline in transnational corporation investments in certain minerals. This decline has continued despite considerable new investments in the petroleum sector in some developing countries. New transnational corporation investments in other primary commodities and plantation industries have also shown a declining trend, although former investments continue to afford a major role to transnational corporations in countries where government policies have not significantly affected the structure of foreign ownership and control.

UN Doc. E/C.10/74, at 18, para. 38 (1980); *see also* p. 29, para. 76:

> Regardless of whether the purpose of a given instrument is primarily to prevent negative effects or to channel foreign direct investment into desired directions, and regardless of whether the level of control and encouragement is national or international, it has been found important that the legal and regulatory frameworks are kept reasonably clear and stable.

[81] *See, e.g.,* Jiménez de Aréchaga, *supra* note 7, at 184; Castañeda, *supra* note 9, at 12.

On the political level, the arguments of the developing states are also flawed by a contradiction stemming from the general relationship between industrial and developing states. In spite of increased efforts towards self-reliance by developing countries on the national and the collective level, the major thrust of the demands for a new international economic order clearly derives from the call for increased assistance from the industrial states. On the levels of monetary policy, trade, and technology, and in other areas, more intensive forms of interaction between developing and industrial states are indeed needed. In recognition of existing bonds of interdependence, the "New International Economic Order" is (or at least should be) intended to reduce confrontation in international economic relations. From the standpoint of international law, this entails increased bilateral and multilateral institutional arrangements for cooperation. Insistence upon the applicability of the Calvo Doctrine represents an anachronism in this global context inasmuch as it increases emphasis on state sovereignty at a time when basic needs are increasing interdependence.[82] Tempting as the concept may be from the viewpoint of the Third World, a profound change in the international economic order will not come about through the rearrangement of all economic relationships exclusively in favor of the developing states; the sensitivity of the economies of the industrial states in times of sudden disruption of international economic relations has been revealed in recent years more clearly than ever before. The much discussed transfer of the notion of the welfare state from the national to the global level requires a balanced scheme of new rights and obligations.[83]

A last grave anomaly of the present debate must be pointed out: it concerns the insistence of industrial states upon the continued validity of the Hull rule. As mentioned above, practically all of these states have acknowledged to themselves, on the municipal legal level, that the payment of prompt, adequate, and effective compensation may not be feasible un-

[82] *See* Virally, *supra* note 9, at 69. Commenting on this situation, Schachter writes: "This apparent contradiction cannot be dismissed as irrational; it should be understood as reflecting a polarity inherent in the objective circumstances and, in that sense, as a challenge to seek a reconciliation that would, to the extent possible, maximize the competing values." O. SCHACHTER, *supra* note 1, at 126. In the limited context described here, it would not necessarily appear to be a paradox, as Brownlie, *supra* note 1, at 308 *ff.*, seems to suggest, if foreign investment received more protection today than previously. Specifically with respect to the "international" or "national" status of concessions, general principles have less importance than the autonomous will of the parties concerned. A presumption in favor of the international status of such contracts has correctly been denied by most commentators and courts; in this respect, the reasoning of the arbitrator in the *TOPCO/Calasiatic* case is not entirely convincing.

It has been correctly pointed out that the use of the concept of permanent sovereignty over natural resources for the purpose of denying the binding effect of international treaties may not be helpful for the developing countries; *see* Brownlie, *supra* note 1, at 310; García-Amador, *supra* note 8, at 56.

[83] For a recent version of this approach, see the "Brandt Report": INDEPENDENT COMMISSION ON INTERNATIONAL DEVELOPMENTAL ISSUES, NORTH-SOUTH: A PROGRAMME FOR SURVIVAL (1980).

der all circumstances. Depending upon the magnitude of the measures, the fiscal power of the country concerned, and the general state of its economy, iron application of the Hull rule would result at times in disastrous consequences to the common good. The conclusion that industrial states have drawn from this simple fact is not that a state must necessarily refrain from expropriatory measures under such circumstances, but that the compensation scheme must then be adapted to the fiscal and economic facts.[84] At the same time, the current arguments of the industrial states imply that developing countries with weaker economies should observe the Hull rule under all possible circumstances.

One may question the relevance of these considerations in view of the fact that the expropriation of alien property affects the investor's home economy in a manner over which the expropriating state has no control and for which it bears no political responsibility. However, the territorial sovereignty of the host state and the jurisdiction of the home state over the exported capital intersect at this point.[85] The home state's (implicit or explicit) permission to export the investor's capital may be taken as general recognition that this capital is no longer fully under that state's control;[86] should a state under exceptional circumstances attempt to prevent repercussions from such investment, under international law it would not be prohibited from enacting domestic legislation to restrict capital exports.[87] An argument for the Hull rule can therefore hardly be derived from the potential impact of the compensation scheme upon the home country's economy.

The notion of a "solidarity community" has in the past been used to support both the Hull rule and the Calvo Doctrine. With respect to the

[84]Dolzer, *supra* note 58.

[85]The following observations of the ICJ in the *Barcelona Traction* case ([1970] ICJ REP. at 33 *f.*) are addressed to a different issue, but indirectly apply in this context as well:

> Diplomatic protection deals with a very sensitive area of international relations, since the interest of a foreign State in the protection of its nationals confronts the rights of the territorial sovereign, a fact of which the general law on the subject has had to take cognizance in order to prevent abuses and friction.

[86]In his separate opinion in the *Barcelona Traction* case, *id.* at 268, Judge Gros appears to advance the proposition that the increasing involvement of home states, for instance, via risk guarantees or subventions, no longer permits alien investment to be treated as a relationship between the alien and the host state only. Jiménez de Aréchaga, *supra* note 7, at 182, similarly assumes that the community of the home state is directly affected by an expropriation of an alien. Such arguments are obviously not entirely misguided from an economic viewpoint. Their legal relevance, however, must be assessed in light of the territorial jurisdiction of the host state.

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> So far as general international law is concerned, it is still hardly possible to say that there is a ius communicationis in the form of a right to communicate and a corresponding duty to open the frontiers for communication. It is arguable that the concept of an international legal community necessarily means that there must be some communication between its members but so long as recognition may be withheld with the result that no relations whatsoever are established, it is difficult to say that such a binding principle exists.
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> H. MOSLER, *supra* note 15, at 251.

Hull rule, it refers, in the context of foreign investments, to an exclusive solidarity between the alien and his home state; with respect to the Calvo Doctrine, it points to an exclusive solidarity between the host state and the alien investor. On the political as well as on the legal level, neither one of these views can be upheld in an unqualified manner under modern standards.

Doctrinal Elements of the Present Law

The facts and viewpoints just discussed are not without relevance from a legal standpoint. An interpretation of the elements making up the present law, however, must also address the wider conceptual framework before turning to substantive standards. An analysis of recent arbitrations dealing with expropriations involving international contracts (no others have been published lately) and of the conclusions of writers clearly illustrates that the doctrinal premises have a strong bearing on the substantive result.[88]

As was mentioned earlier, a large part of the difficulty with the present law on expropriation derives from the fact that the doctrine on sources of customary law is unclear in this area;[89] in this sense, determination of the applicable law may well be called "a source problem." Much has been written about the conditions under which customary law comes into existence; much less has been said about the circumstances under which customary law disappears or takes on new substance. Certainly, some general principles are common to all processes of change in customary law,[90] but certain aspects require particular attention when considering the change of law, as opposed to its creation. The difficulties in this respect are compounded for expropriation law by the lack of consensus on the traditionally recognized rules and on a new rule as well. Under such circumstances, the doctrine of sources prohibits, as shown above, the fictive upholding of the traditional rule as still existing. At the same time, the doctrine requires the consensus of the major affected groups for change to occur, which negates the assumption that international law simply disappears if there is no common opinion on new law under such circumstances; with respect to expropriation law, this aspect excludes the Calvo Doctrine from being accepted as now forming part of international law.

Given this framework, an important element immediately and necessarily emerges. The law applicable under such circumstances cannot coincide

[88] *See, e.g.*, the Aramco arbitration, 27 ILR 117 (1963); the British Petroleum Exploration Co. arbitration, *partially reported in* 1 G. WETTER, THE INTERNATIONAL ARBITRAL PROCESS 432-40, 2 *id.* at 559–622, and 5 *id.* at 489–91; *reprinted in full in* 53 JLR 297 (1979); the Sapphire arbitration, 35 ILR 136 (1967); and the TOPCO/Calasiatic arbitration, 17 ILM 3 (1978).

[89] *See* p. 556 *f. supra.*

[90] Bleckmann, *Völkergewohnheitsrecht trotz widersprüchlicher Praxis?*, 36 ZAöRV 374, 378 (1976), seems to argue that once a specific rule of customary law has developed, this rule disappears only when new practice can be shown that is generally accepted. It is doubtful whether such a strong emphasis on the stability of international law adequately reflects the consensual foundation of customary law. *See also* on this point Bernhardt, *supra* note 46, at 68.

with the "legal opinion" held by one of the contesting groups; a strictly consensual view of international law is thus excluded.[91] As a result, the law will have to be found by searching for common elements and by determining what will satisfy the broader interests of the international legal community. International courts have not used these same terms, but instead have chosen such concepts as "equitable principles" and similar legal constructs.[92]

It is clear that this perspective will entail a certain creative function for the decision-making body involved. Nevertheless, though international law is built strongly upon the will of states, such an approach is appropriate within this structure; the alternative under current circumstances would be an abdication of the role of law in all areas where no precise, overreaching common opinion still exists in the international community.[93] An essential consequence of this approach for the decision-making body will be, of course, that the subjective views of arbitrators or judges involved will be ignored as much as possible; elements implicit in the viewpoints of the states concerned, general principles of law, the needs of the international community, and other teleological components of legal reasoning will be introduced in dealing with the issue.[94] A rule may thus be gradually developed in an evolutionary manner, in a process that may not be identified with subjective judicial rule making. The policy-making element obviously cannot be entirely eliminated;[95] in this specific context, general considerations of policy may indeed gain more practical importance in the formulation of customary law in the future.[96]

Substantive Elements of the Present Law

Factors entering into an "appropriate" or "equitable" solution have been mentioned incidentally above in the discussion of the Hull rule and the Calvo Doctrine, and especially in the general analysis of the arguments dominating the present confrontation. In tying them together, contours of the present law as a court might view it appear in several of its parts;

[91]For the Soviet view, see, *e.g.*, Tunkin, *Remarks on the Juridical Nature of Customary Norms of International Law*, 49 CAL. L. REV. 419 (1961); Tunkin, *"General Principles of Law" in International Law*, in INTERNATIONALE FESTSCHRIFT FÜR ALFRED VERDROSS ZUM 80. GEBURTSTAG 523 (1971).

[92]*See, e.g.*, the terminology used by the ICJ in the North Sea Continental Shelf case, [1969] ICJ REP. at 46 *ff.*; and in the Fisheries Jurisdiction case, [1974] *id.* at 3, 30.

[93]*See* Brownlie, *supra* note 1, at 287.

[94]Mosler's general remarks, written in the introduction to his work, *The International Society as a Legal Community*, *supra* note 15, at xviii, apply here as well: "We have to approach the problem from both sides—from a realisation of the need for international life to be governed by rules binding all participants, on the one hand, and from the investigation of realities of present international life on the other" (footnote omitted).

[95]For the limitations of this approach, see Wood, *Public Order and Political Integration in Contemporary International Theory*, 14 VA. J. INT'L L. 423, 438 (1976); Higgins, *Policy and Impartiality: The Uneasy Relationship in International Law*, 23 INT'L ORGANIZATION 914 (1969).

[96]Sornarajah, *supra* note 7, at 110, points out certain policy considerations that work in the same direction.

however, a comprehensive formulation of the rule requires that additional elements be deduced from more general methods of legal reasoning. Among these methods, fundamental legal principles and general principles of law will necessarily assume major importance in the present and future construction of the law.[97]

To begin with, it is useful here to recognize the importance of the basic international legal principle of good faith. Because of its fundamental status in international relations, it operates not only among states, but also between states and aliens.[98] The chief architect of the Charter of Economic Rights and Duties of States, Ambassador Jorge Castañeda, confirmed the applicability of this principle to expropriation problems in a comment on the Charter.[99] Put briefly, such application entails treatment of the foreigner bringing his property into the host country that will not unduly frustrate the "legitimate reliance" he placed upon the host state's decision to allow the import of foreign property into its territory. For reasons of economic or political expediency, states have frequently enacted legislation prohibiting the import of foreign-owned capital into certain sectors of their economy; international law does not prohibit the exercise of this sovereign right.[100] If, on the other hand, a state decides, in any form whatsoever, to open its borders to alien property, it correspondingly assumes obligations flowing from the reliance on it that it has thus induced in the alien.

The term "legitimate reliance," of course, is a circular one, to a certain extent, because it is a matter of law and not of fact upon which forms of conduct reliance may be placed. But it cannot be doubted that a certain core of substance is implied in the concept itself.[101] An extreme example

[97]*See generally* Verdross, *Les Principes généraux de droit dans le système des sources du droit international public,* in RECUEIL D'ÉTUDES DE DROIT INTERNATIONAL: EN HOMMAGE À PAUL GUGGENHEIM 521 (1968); H. MOSLER, *supra* note 15, at 122–43. With a strong positivist inclination, Brownlie, *supra* note 1, at 288, suggests that equity "offers little but disappointment" for the solution of sophisticated problems, but admits a "particular and interstitial significance." Brownlie's view is certainly well-founded when a judgment is reached directly on the basis of "equity" without an explanation of the factors and principles that inform the concept of equity with regard to the issue at hand. My own general view is nonetheless less reserved on this point, the main reason being that the composition of an international court will in general lead to solutions in which the interests involved will tend to be well presented, considered, and ultimately balanced. Today, the role of international courts in the development of international law appears to be unduly hampered by a rigorous insistence upon the will of the states involved; obviously, the confidence of commentators in a court's skill and power to balance diverging political interests varies in different legal systems.

[98]Jiménez de Aréchaga, *supra* note 7, at 194.

[99]Castañeda, *supra* note 9, at 54; *see also* García-Robles, 69 ASIL, PROC. 231 (1975).

[100]*See supra* note 87.

[101]The general relevance of the idea of legitimate reliance becomes obvious in such principles as "estoppel," "acquiescence," and "prescription." Much broader, the protection of induced reliance is one of the central elements around which the process of the growth of customary law is centered; *see* J. P. MÜLLER, VERTRAUENSSCHUTZ IM VÖLKERRECHT (1971). Although these applications of the concept of legitimate reliance apply to relationships between states, the importance of the concept suggests its application to aliens as well. It must be recognized here that "legitimate reliance" as such is not a general principle of law in the sense of Article 38 of the ICJ Statute: it is too vague, unsophisticated, and begs the question to a considerable extent. Nonetheless, the various applications of legitimate reliance in inter-

will illustrate this. If an alien investor imports his property lawfully one day and is expropriated the next day without compensation, it would hardly be proper to deny that the principle of good faith has been violated and that the investor's "legitimate reliance" on the host state has been unfairly frustrated. The result of such an operation of the concepts of "good faith" and "legitimate reliance" is the meeting, in principle, of the requirements of a continuous and increased international flow of capital, which, as was seen above, is crucial for the development and stabilization of the international economy in general, and the economy of developing countries in particular.[102]

Before more specific corollaries of this principle are addressed, a brief analysis is called for of whether resort to the principle of "unjust enrichment" would be preferable. Jiménez de Aréchaga has recently argued that this principle constitutes the legal foundation of current state practice.[103] In the opinion of the present writer, various difficult questions are raised by recourse to the principle of unjust enrichment. As indicated above, the relevance of general principles to customary law must be carefully analyzed before their application on the international law level is considered. A survey of national legal orders indicates that the concept of unjust enrichment operates in a manner that nullifies certain transactions without proper legal grounds. In civil law, the central element upon which the principle rests is that of a *"causa."* But determination of such a *causa* requires reference to parts of the legal order other than the principle of unjust enrichment itself.

The difficulties of transplanting the isolated concept of unjust enrichment become apparent in this perspective: this concept constitutes a mechanism that corrects transactions, but provides for no independent legal perspective on any situation, and is therefore fundamentally ambivalent

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national law must be recognized, and it does not appear methodologically improper to use the concept in a new sense in an area where international law is in the process of change. It may be added here that the concept of legitimate reliance is basic to any notion of property and property protection.

[102]The political stability as such of the host country and the general political process are not open to the alien to influence. Of course, foreign investment may under certain circumstances bear on political stability. Nonetheless, the political and legal decisions concerning the admission of foreign investment, the legal conditions to be observed by the alien in case of admission, and the decision whether to terminate foreign investment are exclusively within the competence of the host country. Therefore, factors relating to the political stability of the host country should not enter into a scheme of "legitimate reliance." In this context, it is also worth noting that international law is indifferent with respect to the form of government established within a state.

[103]Jiménez de Aréchaga, *supra* note 7. For previous discussions of the principle in this context, see, *e.g.*, Bin Cheng, *The Rationale for Compensation for Expropriation,* 44 GROTIUS SOCIETY, TRANSACTIONS 267 (1959); McNair, *Opinion on the Seizure of Property and Enterprises in Indonesia,* 6 NETH. INT'L L. REV. 218 (1959); W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 207 (1964); Schreuer, *Unjustified Enrichment in International Law,* 22 AM. J. COMP. L. 281 (1974); B. WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 149 (1959); all with further references.

at the international law level.[104] One example shows this ambiguity. Unjust enrichment could in principle operate in favor of both the foreign investor and the host country. It would appear to be at least arguable that any expropriation transaction without full compensation could be viewed as an unjust enrichment of the host country.[105] If the principle is to be used in favor of the host country as a corrective mechanism (as Jiménez de Aréchaga implies), a principle justifying the duty to compensate is logically required as an earlier step.

Aside from the level of principle, the concept of unjust enrichment, as understood by Jiménez de Aréchaga, is not in all respects helpful in providing a satisfactory perspective on previous practice. First, it is questionable under international law whether no compensation is due in all cases in which the host country receives no material gain from the expropriatory action. If a country orders the destruction of all pharmaceutical factories, compensation might well be required in the light of previous practice. Broadly speaking, the adoption of the principle of unjust enrichment could in effect mean that indirect expropriations, consisting of such measures as deprivation of control of ownership or similar acts, would never require compensation.[106] Such a position, however, would need to be supported by further arguments before it could be acceptable. Moreover, in the past, the general measure of compensation has not been determined by the host country's assessment of the value of the property, but by factors based on more objective factors such as market value and other elements to be discussed below. In particular, the concept of unjust enrichment does not begin to explain why compensation has in practice been lower in cases of large-scale expropriations reflecting a broader social program than in seizures of a more isolated nature. In sum, for these reasons this principle will not be relied on here, although it admittedly allows valuable insights into state practice in some respects.[107]

The above observations on modern developments in domestic industrial property orders will necessarily have an important effect on the discussion here of legitimate reliance and its legal origins. Put in plain terms: from the viewpoint of international law, no reasonable ground exists for an

[104]This is illustrated by the fruitless discussions of the substance of this principle in rules of state succession; *see* [1969] 1 Y.B. INT'L L. COMM'N 69 *ff*. *See also* on this point, O'Connell, *Recent Problems of State Succession in Relation to New States*, 95 RECUEIL DES COURS 130, 140 (1970 II).

[105]Whereas Francioni, *supra* note 3, argues that the concept should limit the compensation claim of the owner, Bergin, *The Compensation Rule: An Imaginary Debate*, in 2 THE VALUATION OF NATIONALIZED PROPERTY, *supra* note 3, at 3, 15, seems to suggest that, in principle, it should operate against the expropriating state.

[106]*See, e.g.*, Albrecht, *Taxation of Aliens in International Law*, 29 BRIT. Y.B. INT'L L. 145 (1952); Christie, *What Constitutes a Taking under International Law?*, 38 *id.* at 307 (1962); Vagts, *Coercion and Foreign Investment Rearrangements*, 72 AJIL 35 (1978).

[107] Turning to another detail, Judge Jiménez de Aréchaga assumes that compensation will be "much higher" (*supra* note 7, at 192) if a contract is annulled by the expropriatory action; the concept of legitimate reliance explains such reasoning more easily than the notion of unjust enrichment.

investor to expect a more favorable scheme of compensation from a host country than is indicated by representative standards accepted by those countries with both the highest standards of property protection and the highest level of capital exports. Both dogmatic and substantive considerations support reliance upon a comparative standard based on a survey of those national standards.[108]

Of course, it is not easy to arrive at a specific definition of a comparative standard because no mathematically uniform development of national orders can be discerned.[109] Nevertheless, several deductions of major import have emerged from the comparative survey. The most important is that the principle underlying the expropriation schemes generally envisages a balance of interests between the affected owner on the one hand and the interests of the expropriating state on the other hand.[110] Again, the specific contours of this widely accepted principle vary among national orders, but its general applicability has to be admitted. On the international plane, this principle operates in at least three important ways.

First, the impact of the compensatory obligations on the economy of the expropriating state does have a bearing upon the amount of compensation. This also holds true for the timing of compensation, as is illustrated by domestic French and British postwar compensation practice;[111] "prompt payment" is thus not required by national law under all circumstances.[112] That the amount of compensation to be paid will be influenced by the fiscal situation in the host state[113] is shown by the Marcona negotiations, where the U.S. negotiators "came prepared to seek a package consistent

[108]Recourse to domestic orders within this specific doctrinal framework is not precluded by the foregoing remarks (p. 569 *f.*) concerning general principles and international law in this field.

[109]Dolzer, *supra* note 58.

[110] Meessen, *supra* note 7, at 28, has correctly pointed out that a balancing of interests is required even under the standards of Article 24 of the Charter of Economic Rights and Duties of States. The present author does not fully accept Meessen's view, however, inasmuch as he suggests, on p. 28, that the international law on compensation serves the function of equalizing economic conditions between states with different economic strength; interstate debt regulation, for instance, is a much more appropriate instrument for contributing to this aim than the measure of compensation to be granted to individual owners. Meessen's starting point that the damages owed the home state due to an expropriation measure form the basis of the compensation is in line with the traditional view that, in case of diplomatic protection, the protecting state itself is the creditor and not the expropriated individual. It appears questionable, however, whether this view (*see, e.g.,* Mavrommatis Jerusalem Concessions, [1927] PCIJ, ser. A, No. 11) can be upheld on the basis of a modern concept of the position of the individual in international law.

[111] *See* Dolzer, *supra* note 58.

[112]Considering present treaty practice, it is worth mentioning here, for instance, that standard Swiss investment treaties do not require prompt compensation, but compensation "without undue delay." *See* Levy & Gattiker, *Behandlung und Schutz der Auslandsinvestitionen, Institutionen im Wandel,* 35 AUßENWIRTSCHAFT 53, 61 (1980).

[113]Of course, this view is far from novel. Romania relied on it in the 1920's, and so did Mexico after expropriations in the late 1930's. *See also* on this point Judge H. Lauterpacht, *Règles générales du cours de la paix,* 62 RECUEIL DES COURS 346 (1937 IV); García-Amador, *supra* note 7, at 48, with extensive further references; Meessen, *supra* note 7, at 28.

with the requirements of the economy of the host country as well as those of the company."[114] This position implies that the amount of compensation may vary according to the magnitude of the expropriatory measures and the net amount of obligations owed by the host state. In addition to the lump sum agreements with East European states, this view explains the compensation paid by France to Great Britain for expropriated British rights in the French gas and electric industry.[115] Considering the general state of the economies of most developing countries, full payment is unlikely to be the rule in their compensation practice. Recent practice, with its emphasis on "package compensation" involving cash and other arrangements, appears to conform to this lower standard to a large extent.[116] The scheme outlined here ensures that states with weak economies will not be tempted under this standard to "make cheap buys" at the expense of foreign owners. The economic impact of the compensation is only one among several factors that contribute to determining its amount; the very concept of a balance of interests implies that the owner's interest cannot be ignored in the compensation arrangements.

A second element that may influence such a balance-of-interests scheme relates to the original expectations of the investor when he decided to place his property in the host country.[117] In a certain respect, this element resembles Sohn and Baxter's apt, reliance-oriented observation that an alien who has engaged in business in a host country for a long period should not expect the same privileged treatment (compared to that of the national of the host state) as somebody who has just entered the country.[118] Of

[114]Gantz, *supra* note 14, at 490.

[115]According to Schwarzenberger, *The Protection of British Property Abroad,* 5 CURRENT LEGAL PROB. 307 (1952), the compensation amounted to 70% of the value of the rights expropriated; the credit vouchers issued by France were payable in seven annual installments.

[116]*See* the compensation scheme in the *Marcona* case; Gantz, *supra* note 14. In this settlement, the computation of compensation included to a large extent the profits that Marcona hoped to make under the terms of the ore sales contract reached as part of the agreement. Marcona paid roughly the same price as other trading partners of Peru. One wonders whether such an arrangement is really compatible with the old Hull rule. Arrangements of a similar type had been made in 1975 in the compensation schemes for various U.S. companies expropriated by Venezuela; *see* N.Y. Times, Aug. 30, 1975, at 27; Dec. 8, 1974, at 17; and Dec. 9, 1975, at 66.

[117]Bergin, *supra* note 105, at 16, seems to voice a similar argument:

> [T]he adjudicators would, in a sense, put the parties to the bargain back in the bargaining phase. The question to be answered would be this: What would a *fair and reasonable* investor have asked to be paid for the benefits that this investor has actually bestowed upon this nation, and what would a *fair and reasonable* nation have reasonably been willing to pay for the benefits that this nation has actually received? As you can see, it is entirely possible that an investor would be made whole as a result of the adjudication.

[118]*See* Sohn & Baxter, commenting on Article 2 of their Draft Convention, in F. V. GARCÍA-AMADOR, L. B. SOHN & R. R. BAXTER, RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS (1974), at p. 157:

> The "national treatment" theory admittedly has a certain plausibility. Especially if an alien has been long resident on the soil of a foreign State, enjoying the advantages of life in that State and the protection of its government, there is some basis for maintaining

course, it is not easy to determine which expectations are in fact reasonable. But it should be recalled in this context, for instance, that domestic tax schemes have sometimes been based on "average profits"[119] and that the regulations on dumping in various countries are based on a concept of "fair value."[120] It is true that both excess profits taxes and fair value dumping rules are based on standards with a relatively objective basis; the latter attempt to construe the local price in the exporting state, and the former typically apply to profits made above those of a prewar or pre-emergency period. The notion of "reasonable profits" in a balance-of-interests scheme may lack such a degree of objectivity. Nevertheless, conceptually, the existence of excess profits taxes and fair value dumping rules indicates that, on the national and the international level, attempts to construe certain economic factors related to profits by reference to "average figures" have not been deemed absurd or useless under all circumstances.[121]

A third element that may be drawn from domestic practice is that the "reliance" factor may lead to varying results, according to the scope of the expropriatory actions. General statutory orders of expropriation applicable to a broad category of owners will hardly be "reasonably expected" per se, but measures affecting the economy as a whole will tend to affect expectations less specifically than those directed at a single owner or a small group. This aspect of the "reliance" factor overlaps, of course, with the rules on discrimination[122] and with the notion that compensation for large-scale expropriation will place a particularly strong burden on the economy of the expropriating state. In practice, it may well be assumed that a large number of lump sum agreements concluded after World War II with Communist states were arranged with this consideration in mind.

A second class of elements having a bearing on compensation schemes relates directly to the needs of developing countries, as recognized by today's international economic community. However, one may also view all

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that he should in corresponding degree become assimilated to a national of that State. To the extent his circumstances resemble those of a national of the State, to that degree he should lose any special protection he might otherwise enjoy under international law and become, like the other inhabitants of that State, subject only to its law. There is a certain voluntary submission to the legal and social system of the State in long residence in its territory.

[119] Wesley, *supra* note 31, at 33–40, describes the excess profits systems in the domestic orders of the United States, the United Kingdom, and the Federal Republic of Germany. *See also* on this point, O. SCHACHTER, *supra* note 7, at 128.

[120] Clearly, a cautious approach is indicated to the comparison of dumping and expropriation procedures. The point here is restricted solely to the fact that the notion of "fair value" as used in dumping procedures indicates that an attempt at establishing "fair profits" in the expropriation area may not be totally out of line with current international business regulations. *See,* on dumping in general, J. JACKSON, INTERNATIONAL ECONOMIC RELATIONS 691–753 (1977); for the latest European Economic Community and U.S. regulations on antidumping, see 19 ILM 429 (1980).

[121] Sornarajah, *supra* note 7, at 121–26.

[122] *See* W. KEWENIG, DER GRUNDSATZ DER NICHTDISKRIMINIERUNG IM VÖLKERRECHT (1972); Charpentier, *De la Non-discrimination dans les investissements,* 9 ANNUAIRE FRANÇAIS DROIT INT'L 35 (1963); *see also* the Chinn Case, [1934] PCIJ, ser. A/B, No. 63.

the elements in this category as specific, but in some ways only less obvious, elements of modern domestic orders; whereas the first category referred to domestic orders of industrial countries, this second group is drawn from modern developments in the national orders of developing countries.

The substance of the arrangements between host states and alien investors has undergone considerable change in the past few decades. David Smith and Louis T. Wells, Jr. have aptly described this evolution as being from "concessions to modern service agreements."[123] It does not matter here whether the difference is in reality as strong as that suggested by this description. What does matter is that the tendency to subject alien investors directly to the generally applicable domestic laws—instead of specifically negotiated bilateral agreements—has in some regions become stronger, that the royalty arrangements are increasingly being renegotiated in a more flexible and sophisticated manner that in principle benefits the host states, and, most importantly, that the duration of the contracts has been much more limited than under most of the old concessions. These changes are the principal ones to be noted here, but others have been introduced as well. Viewed in context, they indicate that the balance of interests has generally shifted in favor of host countries, although modern contracts have not become unacceptable to investors in the process. These modern arrangements tend to support much more strongly than the old ones the developmental aims of the developing countries, as recognized by the international community. New concepts of profit sharing, technology clauses, local personnel involvement, and various other aspects of these agreements are supported by general efforts to promote the interests of developing nations on the international level. "Legitimate reliance" viewed in the context of a modern expropriation scheme indicates that an alien should place less reliance upon colonial-type arrangements than upon modern schemes that reflect well-considered developmental strategies of the host country. The more traditional types of investment contracts, often dating from colonial times, have mostly not been negotiated and worded with any particular heed to the developmental needs of the host country. Translated into a balance-of-interests-oriented scheme of compensation, this in turn implies that the host country's interests in a compensation scheme are stronger under the old colonial arrangement and become weaker the more modern the investment law that originally governed the alien property becomes.[124]

The highly complex question arises whether these considerations should be given even stronger weight by phrasing them more generally in terms

[123] D. N. SMITH & L. T. WELLS, JR., NEGOTIATING THIRD WORLD MINERAL AGREEMENTS *passim* (1976); *see also* D. N. Smith, *Mining the Resources of the Third World: From Concession Agreements to Service Contracts,* 67 ASIL, PROC. 227–36 (1973); Zorn, *New Developments in Third World Mineral Agreements,* NAT. RESOURCES F., April 1977, at 248; Asante, *Restructuring Transnational Mineral Agreements,* 73 AJIL 335 (1979). Vellas, *Droit de propriété, investissements étrangers et nouvel ordre économique international,* 106 J. DROIT INT'L 21 (1979), commented on this development from the viewpoint of the protection of the alien.

[124] *See* the discussion remarks of Bernhardt, in VÖLKERRECHT, *supra* note 7, at 50.

of the value of the investment for developmental purposes to the international community. From a traditional legal viewpoint, the negative answer to this question may flow directly from the existence of the sovereign right of each state to determine its own domestic order; this principle was restated in the Charter of Economic Rights and Duties of States.[125] Thus, it may be argued that the decision about the positive and negative value of any foreign property for the host state lies clearly within the purview of the host government and cannot be determined in the framework of an international perspective. Along the same lines, it must be recognized that so far no generally accepted economic doctrine on the process of development has emerged. The recent oscillation in emphasis between growth in general on the one hand, and specific human needs on the other hand, illustrates this uncertainty. Finally, there is some weight to the argument that the task of determining these developmental aspirations should not and cannot be shifted to the foreign investor.

In sum, these considerations indicate that an abstract developmental evaluation of the expropriated property in question should not form part of a compensation formula. Nonetheless, there are good grounds for not entirely ignoring the significance of investment for development. It cannot be overlooked that some of the most serious developmental problems have had their origin in clearly non-developmental-oriented policies of the governments concerned. At a time when the "development" of developing countries, even if lacking precise definition, has become a central aspiration of the international community, it may well be questioned whether the above arguments should not be partly overridden when the developmental uselessness of an investment is manifest. If an investment requires an unusually high amount of capital, involves technology inappropriate to the developmental purposes of the host country, and also closes the capital and distribution markets to domestic competitors, it may well fall into this category. An international observer may then be entitled to consider it a "manifestly nondevelopmental investment," and accordingly to assume that there is no reason to protect forcefully the alien owner's reliance on the relevant arrangement.

In this context, it should be recalled that "developmental evaluation programs" do exist. On the international level, financial organizations examine the nature of a planned investment not only from a strictly financial viewpoint, but also in light of the domestic needs of the host country.[126] Insurance programs for foreign investments require, in a more or less uniform manner, that similar considerations be taken into account before an insurance contract is granted.[127] At the same time that it recognizes the

[125]Art. 7 of the Charter of Economic Rights and Duties of States; *see also* Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, pt. 5, Annex to UNGA Res. 2625 (XXV) (1970), *reprinted in* 65 AJIL 243 (1971), 9 ILM 1292 (1970); common Art. 1 of the human rights Covenants.

[126]The World Bank has developed special expertise in this area; *see, e.g.,* Hürni, *The "New-Style" Lending Policy of the World Bank,* 13 J. WORLD TRADE L. 523 (1979).

[127] The U.S. Overseas Private Investment Corp. (OPIC) was established by the Foreign Assistance Act of 1969, 83 Stat. 805 (1969). Section 231(3) of the Act reads: "Only such private

sovereign rights of the host state, a compensation formula might thus reflect the "manifestly nondevelopmental nature of a foreign investment" to the detriment of the alien's compensation. For the reasons indicated above, the benefit of the doubt must be given to the alien if this question comes into play. But, to borrow the terminology of national administrative law, if it was evident to the alien that the host government had abused its discretion to promote the aims of its country in initially admitting the investment, then it should be asked whether this abuse should be reflected in the compensation scheme by basing it upon a balance of interests and designing it to contribute in an acceptable fashion (by limiting types of speculative investment) to the developmental aims of the international community. Reliance upon structures that reinforce underdevelopment does not deserve protection under modern international law;[128] for arrangements falling into this category, the risks involved should probably be allocated to the investor.[129] The leading role that economists and accountants have already enjoyed in negotiations on compensation might in this respect become even more important in the future.[130]

IV. Outlook

In recent practice, the various modes of compensation for expropriated property of aliens have not followed a uniform model, but have consisted of a variety of schemes apparently governed by no common guiding principle. The foregoing analysis has attempted to indicate the broad directions in which the arguments have been moving; at the same time, the legal principles likely to govern the present and future law have been outlined. It might be objected that these principles are too complex and in certain

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investments should be supported as are sensitive and responsive to the needs and requirements of the local economies and which contribute to the social and economic development of the people of the host country."

[128]There is some evidence that the Marcona Co. enjoyed an economically privileged position before it was expropriated by Peru; *see* Gantz, *supra* note 14, at 478. Perhaps this helps explain why the agreement was in important respects considerably more favorable to Peru than the traditional Hull formula would have allowed.

[129] In a stimulating way, F. S. Dunn attempted, as early as 1932, in his work *The Protection of Nationals,* to apply a risk allocation model to the law regarding aliens. More recently, Brownlie, *Treatment of Aliens: Assumption of Risk and the International Standard,* in Festschrift für F. A. Mann 309 (1977), examined the usefulness of such a concept. His rather negative conclusions deserve support inasmuch as they concern a broad use of the risk idea; in specific situations, recourse to this standard remains legitimate. The suggestion that past contributions to the local economy should be a factor in the computation of the amount of compensation is not entirely new; *see* Weston, 62 ASIL, Proc. 43–46 (1968); Goldman & Paxman, *Real Property Valuations in Argentine, Chile and Mexico,* in 2 The Valuation of Nationalized Property, *supra* note 3, at 164; Rohwer, Note, 14 Harv. Int'l L.J. 382, 388 (1973); O. Schachter, *supra* note 1, at 128.

[130]During the Marcona negotiations, a special study of the Stanford Research Institute on the value of the property played a key role; *see* Gantz, *supra* note 14, at 490; *see also* McCosker, *Book Values in Nationalization Settlements,* in 2 The Valuation of Nationalized Property, *supra* note 3, at 36.

respects too vague.[131] But if the practice of the postwar years has taught anything, the most obvious lesson is that the simplicity of the Hull rule cannot again be captured in a modern formula.[132] The evolutionary process leading to the transformation of the old rule is characterized by a variety of principles, interests, and situations.[133] No one-dimensional formula can cover all the relevant factors in a particular case today. An elaboration of these relevant factors is nonetheless needed so that the law may again become more comprehensible and predictable than it has been in recent years.

From the viewpoint of dispute settlement, a fair application of sometimes complex principles requires the host country's willingness to reach a solution that is fair to the alien's interests, although such fairness may imply financial sacrifice to itself. In many instances, it might be more appropriate to entrust the decision to an international body.[134] More confidence in the qualities of such a body is needed than has so far been shown in the impartiality and fairness of the International Center for the Settlement of Investment Disputes.[135] In turn, the secrecy of the proceedings in in-

[131]The reasoning of other commentators as well suggests that complex considerations govern the present law. Jiménez de Aréchaga's method of reasoning may not find general approval, but his results share common ground with those of this article:

> The following exemplify factors which should be taken into account: whether the initial investment has been recovered, whether there has been undue enrichment as a result of a colonial situation, whether the profits obtained have been excessive, the contribution of the enterprise to the economic and social development of the country, its respect for labor laws and its reinvestment policies.

Jiménez de Aréchaga, *supra* note 7, at 185.

[132]*See also* W. Rogers, *Foreword,* in 1 THE VALUATION OF NATIONALIZED PROPERTY, *supra* note 3, at viii:

> In fact, easy resort to generalities such as "prompt, adequate, and effective," or "national patrimony," are far more likely to obscure thought, comfort the parties with notions of ideological certainty and moral perfection, and inspire them to dig their trenches deeper. The actual issues in real life are too complex, the cases to be decided, and the precedents of decision, too disparate and unique for easy, simple principles.

In the preparation of the Charter of Economic Rights and Duties of States, industrial states suggested the use of the formula "just compensation in the light of all relevant circumstances"; *see* the document in 14 ILM 262 (1975).

[133]In this respect, the reasoning of the ICJ in the *North Sea Continental Shelf* cases will be recalled. The Court here viewed equity as a rule filling the gap left by strict common law or existing legislation. The application of this concept generally refers to equitable principles, taking into account all relevant considerations, such as geographical situation, length of coast, and proportionality of the respective shores; [1969] ICJ REP. at 6, 47, 53–54. Helpful comments are made in Merrills, *Images and Models in the World Court: The Individual Opinions in the North Sea Continental Shelf Cases,* 41 MOD. L. REV. 638 (1978).

[134]It has been correctly observed that the UN General Assembly has never wholeheartedly favored the settlement of the issue by an international body; *see* Amerasinghe, *Dispute Settlement Machinery in Relations between States and Multinational Enterprises—with Particular Reference to the International Center for the Settlement of Investment Disputes,* 11 INT'L LAW. 45, 46 (1977).

[135]Judge Jiménez de Aréchaga, *supra* note 7, at 190, pointed out that some Latin American countries have decided not to sign this Convention in light of the lack of international judicial guarantees caused by the making of such reservations as the Connally Amendment to dec-

vestment dispute settlements, desirable as it may be otherwise, ought to be reconsidered in light of the need to make the rules governing such disputes more transparent and to promote their acceptance by the international community.

From a general viewpoint, the fact that the compensation scheme may vary in various situations along a sliding scale does not really speak against the scheme that has been analyzed and endorsed here. In context, it is not very surprising that today compensation arrangements may be guided by factors shaped by specific situations within the host country to a greater extent than formerly. Interaction between international law and factors governed by elements falling within a state's domestic jurisdiction may be observed in other areas as well.[136] The rules of diplomatic protection, for instance, are grounded in principles of nationality as prescribed mainly by domestic law. More important for the present context, the treatment of aliens with respect to licenses, taxes, antitrust laws, and other items varies from one jurisdiction to another anyway. Finally, from a political viewpoint, it appears to follow as a matter of course that the past struggle between proponents of the Hull rule and adherents of the Calvo Doctrine (or its modern variants) will lead to a synthesis in which the emphasis upon domestic law will be considerably stronger than under the old Hull rule. Put succinctly, one may therefore well expect that international law will continue to protect alien property, but that the extent of protection will more than previously be in accordance with modern developments in domestic property orders.

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larations filed under Article 36 of the ICJ Statute. *But see also* the study prepared by the U.S. Department of State on *Widening Access to the International Court of Justice,* partially *reprinted in* 16 ILM 187, 196 (1977):

> As the history of the consideration of the law of State responsibility by the U.N. International Law Commission demonstrates, there is widespread challenge by developing and Communist States to established, substantive international law concerning claims. Since many such States seem inclined to deny the legal merits of State responsibility for treatment or mistreatment of the persons and property of aliens, it is to be doubted whether they will agree to widen the procedural avenues open for the vindication of the pertinent rights of aliens—property rights as well as other human rights.

[136]*See* Strebel, *Einwirkungen nationalen Rechts auf das Völkerrecht,* 36 ZaöRV 168 (1976).